TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 27

THE MERCHANT'S NATIONAL BANK OF BOSTON, PLAINTIFF IN ERROR,

vs.

[redacted] NATIONAL BANK OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 18, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 391.

THE MERCHANTS' NATIONAL BANK OF BOSTON, PLAINTIFF IN ERROR,

vs.

THE STATE NATIONAL BANK OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 UNITED STATES, *ss*:

The President of the United States to the judges of the Circuit Court holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before, or some of you, between the Merchant's National Bank of Boston, plaintiff, and the State National Bank of Boston, defendant, in a plea of the case a manifest error has intervened, to the great damage of the said Merchant's National Bank, as in their complaint has been stated. And it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this wit, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, esquire, Chief Justice of the said Supreme Court, at Washington aforesaid, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-third.

[SEAL.] JOHN G. STETSON, *Clerk.*

Allowed by:

NATHAN CLIFFORD,
Asso. Jus. Sup. Ct. U. S.

Circuit Court of the United States.

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

And now here the judges of the Circuit Court of the United States in and for the said district make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, John G. Stetson, clerk of said Circuit Court of the United States within and for the district of Massachusetts, have hereunto set my hand and the seal of said court this twelfth day of December, A. D. 1868.

[SEAL.] JOHN G. STETSON, *Clerk.*

REC. 391—1

2 UNITED STATES OF AMERICA, *Massachusetts District, ss:*

At a Circuit Court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-eight, before the Honorable Nathan Clifford, associate justice, and the Honorable John Lowell, district judge.

THE MERCHANT'S NATIONAL BANK OF BOSTON, a corporation duly organized under the laws of the United States, and having its place of business in Boston, in the district of Massachusetts, plaintiff,

vs.

3 The STATE NATIONAL BANK OF BOSTON, a corporation duly organized under the laws of the United States, and having its place of business in Boston, in the district of Massachusetts, defendant.

In a plea of the case, for that sundry persons doing business under the name of Mellen, Ward & Company, at Boston in said district, on the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, made their two certain drafts or orders in writing for the payment of money, commonly called checks on a bank, and directed the same to the said defendant bank, and in one of said drafts requested said defendant bank to pay the plaintiff bank or its order the sum of two hundred and fifty thousand dollars, and in the other of said drafts requested said defendant bank to pay to the plaintiff bank or its order two hundred and seventy-five thousand dollars; and the said Mellen, Ward & Company, then and there, for the purpose of enabling the defendant bank to obtain from the said plaintiff bank certain certificates of the Treasury of the United States payable to bearer, commonly known as gold coin certificates, then held by and belonging to the plaintiff bank and of great value, did deliver said orders or bank checks, and each of them to the said defendant bank, and thereupon, on the same day, in consideration that the plaintiff bank would, and did, then and there, at

4 defendant bank's request, deliver to it said gold coin certificates, the said defendant bank did then and there declare to the plaintiff bank that said orders or checks of said Mellen, Ward & Company, and each of them, were good, and that said defendant bank had then and there the moneys of the said Mellen, Ward & Company in its possession with which to pay said checks or orders of Mellen, Ward & Company, and each of them, and did then and there, in consideration that the plaintiff bank would and did deliver to said defendant bank said gold coin certificates, did deliver to the plaintiff bank said orders or checks, and each of them, and did promise the plaintiff bank to pay said orders or checks and each of them on presentment thereof by the plaintiff bank at the defendant's banking house in said Boston; and the plaintiff bank thereafterwards, on the

next day, to wit, on the first day of March of said year, duly presented the said orders or checks, and each of them for payment at the banking house of the said defendant bank, and demanded of the defendant bank payment thereof, but the said defendant bank refused to pay the same, or either of them, and though often requested, still neglects and refuses so to do.

And also for that sundry persons doing business under the name of Mellen, Ward & Company, at Boston, in said district, on the
5 twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, made their certain other draft or order in writing for the payment of money, commonly called a check on a bank, and directed the same to the said defendant bank, and thereby requested said defendant bank to pay the plaintiff bank or its order the sum of seventy-five thousand dollars, and the said Mellen, Ward & Company then and there, for the purpose of enabling said defendant bank to obtain from the plaintiff bank certain certificates of the Treasury of the United States, payable to bearer, commonly known as gold coin certificates, then held by and belonging to the plaintiff bank, and of great value, and certain gold coin, then held by and belonging to the plaintiff bank, and of great value, did deliver said last-named order or bank check to the said defendant bank, and thereupon on the same day, in consideration that the plaintiff bank would, and did then and there, at defendant bank's request, deliver to it said gold coin certificates and said gold coin, the defendant bank did then and there declare to the plaintiff bank that said last-named order or check of said Mellen, Ward & Company was good, and that said defendant bank had then and there the moneys of the said Mellen, Ward & Company in its possession with which to pay said last-named check or order of said Mellen, Ward & Com-
6 pany, and did then and there, in consideration that the plaintiff bank would, and did, deliver to said defendant bank said gold coin certificates and said gold coin, did deliver to the plaintiff bank said last-named order or check, and did promise the plaintiff bank to pay said last-named order or check on presentment thereof by the plaintiff bank at its banking house in said Boston, and the plaintiff bank thereafterwards, on the next day, to wit, on the first day of March, of the same year, duly presented the said mlast-naed orde or check for payment at the banking house of said defendant, and demanded of the defendant bank payment thereof, but the said defendant bank refused to pay the same, and, though often requested, still neglects and refuses so to do.

And also for that sundry persons doing business under the name of Mellen, Ward & Company, at said Boston, on the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, made their certain other draft or order in writing for the payment of money, commonly called a check on a bank, and directed the same to the said defendant bank, and thereby requested the said defendant bank to pay to the plaintiff bank or its order two hundred and fifty thousand dollars; and afterwards, to wit, on said twenty-eighth day of February the said Mellen, Ward & Company delivered

the same to the said defendant bank, and the said defendant bank, by its agent and officer thereto duly authorized, then and there certified that said last-named draft or order was good, and that it
7 had funds of the drawers of said last-named draft or order to that amount in its possession, and would, on presentment, pay the same; and afterwards, to wit, on the same day, for value received, the defendant bank then and there delivered the same to the plaintiff, and the plaintiff then and there became the lawful owner of said last-named draft or order, according to the tenor thereof, and of said defendant bank's acceptance of the same; and afterwards, to wit, on the first day of March, in the year of our Lord eighteen hundred and sixty-seven, presented the same for payment at the banking house of the defendant and demanded payment thereof, but the defendant refused to pay the same, and, though often requested, has not paid, but neglects and refuses so to do.

And also for that sundry persons, doing business under the name of Mellen, Ward & Company, at said Boston, on the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, made their certain other draft or order in writing for the payment of money, commonly called a check on a bank, and directed the same to the said defendant bank, and thereby requested the said defendant bank to pay the plaintiff bank or its order two hundred and seventy-five thousand dollars; and afterwards, to wit, on said twenty-eighth day of February, the said Mellen, Ward & Company delivered the same to the said defendant bank, and the said defendant bank, by its agent
8 and officer thereto duly authorized, then and there certified that said last-named draft or order was good, and that it had funds of the drawers of said last-named draft or order to that amount in its possession, and would, on presentment, pay the same; and afterwards, to wit, on the same day, for value received, the defendant bank then and there delivered the same to the plaintiff, and the plaintiff then and there became the lawful owner of said last-named draft or order, according to the tenor thereof, and of said defendant bank's acceptance of the same; and afterwards, to wit, on the first day of March, in the year of our Lord eighteen hundred and sixty-seven, presented the same for payment at the banking house of the defendant and demanded payment thereof, but the defendant refused to pay the same, and, though often requested, has not paid, but neglects and refuses so to do.

And also for that sundry persons, doing business under the name of Mellen, Ward & Company, at said Boston, on the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, made their certain other draft or order in writing for the payment of money, commonly called a check on a bank, and directed the same to the said defendant bank, and thereby requested the said defendant bank to pay to the plaintiff bank or its order seventy-five thousand dollars; and afterwards, to wit, on said twenty-eighth day of February, the said Mellen, Ward & Company delivered the same to the said defendant
9 bank, and the said defendant bank, by its agent and officer thereto duly authorized, then and there certified that said last-named

draft or order was good, and that it had funds of the drawers of said last-named draft or order to that amount in its possession, and would on presentment pay the same; and afterwards, to wit, on the same day, for value received, the defendant bank then and there delivered the same to the plaintiff, and the plaintiff then and there became the lawful owner of said last-named draft or order, according to the tenor thereof and of said defendant bank's acceptance of the same; and afterwards, to wit, on the first day of March, in the year of our Lord eighteen hundred and sixty-seven, presented the same for payment at the banking house of the defendant and demanded payment thereof, but the defendant refused to pay the same, and, though often requested, has not paid, but neglects and refuses so to do.

And also for that sundry persons doing business under the name of Mellen, Ward & Company, at Boston, on the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, made their certain other draft or order in writing for the payment of money, commonly called a check on a bank, and directed the same to the said defendant bank, and thereby requested said bank to pay to the plaintiff bank or its order two hundred and fifty thousand dollars; and afterwards, to wit, on said twenty-eighth day of
10 February, the said defendant bank by its agent thereto duly authorized then and there certified that said last-named draft or order was good, and that it had funds of the drawers of said last-named draft or order to that amount in its possession, and would, on presentment, pay the same; and the said Mellen, Ward & Company, for value received thereafterwards, on the same day delivered the same to the plaintiff bank, and the said plaintiff bank then and there relying on said certificate and acceptance of the defendant bank, received the same, and thereby became the lawful owner of said last-named draft or order, according to the tenor thereof, and of said defendant bank's acceptance thereof; and afterwards, to wit, on the first day of March, in the year of our Lord eighteen hundred and sixty-seven, duly presented the same for payment at the banking house of said defendant, and demanded payment thereof, but defendant refused to pay the same, and though often requested, still neglects and refuses so to do.

And also for that sundry persons doing business under the name of Mellen, Ward & Company, at said Boston, on the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, made their certain other draft or order in writing for the payment of money, commonly called a check on a bank, and directed the
11 same to the said defendant bank, and thereby requested said bank to pay to the plaintiff bank or its order two hundred and seventy-five thousand dollars; and afterwards, to wit, on said twenty-eighth day of February, the said defendant bank, by its agent thereto duly authorized, then and there certified that said last-named draft or order, was good, and that it had funds of the drawers of said last-named draft or order to that amount in its possession, and would, on presentment, pay the same; and the said Mellen, Ward & Company, for value received, then and there delivered the same to the

plaintiff bank, and the said plaintiff bank then and there, relying on said certificate and acceptance of the said defendant bank, received the same and thereby became the lawful owner of said last-named draft or order, according to the tenor thereof; and afterwards, to wit, on the first day of March, eighteen hundred sixty-seven, duly presented the same for payment at the banking house of the defendant and demanded payment thereof, but defendant refused to pay the same, and though often requested, still neglects and refuses so to do.

And also for that sundry persons doing business under the name of Mellen, Ward & Company, at said Boston, on the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, made their certain other draft or order in writing for the payment of money, commonly called a check on a bank, and directed
12 the same to the said defendant bank, and thereby requested said bank to pay to the plaintiff bank or its order seventy-five thousand dollars; and afterwards, to wit, on said twenty-eighth day of February, the said defendant bank, by its agent thereto duly authorized, then and there certified that said last-named draft or order was good, and that it had funds of the drawers of said last-named draft or order to that amount in its possession, and would, on presentment, pay the same; and the said Mellen, Ward & Company, for value received, then and there delivered the same to the plaintiff bank, and the said plaintiff bank then and there, relying on said certificate of the defendant bank, received the same and thereby became the lawful owner of said last-named draft or order, according to the tenor thereof, and of said defendant bank's acceptance thereof; and afterwards, to wit, on the first day of March, in the year of our Lord eighteen hundred and sixty-seven, duly presented the same for payment at the banking house of defendant, and demanded payment thereof, but defendant refused to pay the same, and though often requested, still neglects and refuses so to do.

Also for that the said plaintiff bank at said Boston, on the twenty-eighth day of February, in the year of our Lord eighteen hundred and sixty-seven, was the owner and possessed of eighty-four other gold coin certificates of the Treasury of the United States, of great value, to wit, of the value of five hundred and thirty-seven thousand
13 five hundred dollars, by each of which certificates it was certified by the proper officer of the Treasury of the United States that five thousand dollars had been deposited with the assistant treasurer of the United States in New York, payable in gold to the bearer thereof; and also of certain other gold coin of great value, to wit, of the value of sixty-two thousand five hundred dollars; and the defendant bank afterwards, to wit, on said twenty-eighth day of February, in consideration that the plaintiff bank would sell and deliver to it said last-named eighty-four certificates and gold coin, promised the plaintiff bank to pay it six hundred thousand dollars therefor; and the plaintiff bank avers that it did then and there sell and deliver said certificates and coin to the defendant bank, and requested it to pay said sum for the same, but the said defendant bank, not regarding its said promise, hath not, though often requested,

paid said sum or any part thereof, but wholly neglects and refuses so to do.

And also for that the said defendant bank heretofore, to wit, on the first day of March, in the year of our Lord eighteen hundred and sixty-seven, at said Boston, in consideration of certain other gold coin certificates, so called, and gold coin, at the special written request of the defendant bank, sold and delivered by it to the plaintiff bank, promised to pay the plaintiff bank, on demand therefor, so much money as the same were reasonably worth; and said plaintiff bank avers that the same were reasonably worth the sum of six hundred thousand dollars, but, though often requested,
14 the said defendant bank hath not paid the same, but wholly neglects and refuses so to do.

And also for that the said defendant bank heretofore, to wit, on the first day of March, in the year of our Lord eighteen hundred and sixty-seven, at said Boston, being indebted to the plaintiff bank in the further sum of six hundred thousand dollars for so much money before that time had and received by the defendant bank, to the use of the plaintiff bank, in consideration therefor then and there promised the plaintiff bank to pay it said sum on demand; yet, though often requested, the said defendant bank hath never paid the same, but wholly neglects and refuses so to do, to the damge of the said plaintiff bank, as it says, the sum of eight hundred thousand dollars.

The writ in this cause is dated the fifteenth day of June, A. D. 1867, and was entered at the October term of this court, A. D. 1867, when and where the parties appeared by their respective attorneys, and thence the cause was continued to the May term of this court, A. D. 1868, when the following plea and issue was filed, namely:

MERCHANTS' NATIONAL BANK OF BOSTON
vs.
THE STATE NATIONAL BANK OF BOSTON.

15 And the said defendants, by C. B. Goodrich, their attorney, come and defend, &c., when, &c., and say they never promised in manner and form as the plaintiffs have thereof declared against them; and of this they put themselves upon the country.

State National Bank of Boston, by—

C. B. GOODRICH.

And the said plaintiffs do the like, by—

SOHIER & WELCH,
Their Att'ys.

This cause was thence continued to this present term, when issue having been joined as aforesaid, the cause, after a full hearing, is committed to a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same, return their verdict therein, and upon oath say: The jury find that the said defendants did not promise in manner and form as the said plaintiffs

have above thereof declared against them in the said several counts of the said plaintiff's declaration.

It is thereupon considered by the court, to wit, November 27th, A. D. 1868, that the said State National Bank of Boston, defendant, recover of the said Merchants' National Bank of Boston, plaintiff, its costs of suit, taxed at .

16 Upon the trial of the said cause, after the evidence was closed on both sides and before the issue was submitted to the jury, the said Merchants' National Bank of Boston filed its bill of exceptions, which was sealed and allowed by the court, and is in words and figures following, namely:

17 U. S. Circuit Court, Oct. term, 1868.

THE MERCHANTS' NATIONAL BANK OF BOSTON
vs.
THE STATE NATIONAL BANK OF BOSTON.

DISTRICT OF MASS., *ss:*

Be it remembered that at a term of the Circuit Court of the United States for the first circuit, holden at Boston, within and for the district of Massachusetts, on the fifteenth day of October, A. D. 1867, by the Honorable Nathan Clifford and the Honorable John Lowell, circuit judges, came the Merchants' National Bank of Boston, an association duly organized under chapter 106 of the acts of the Congress of the United States, passed June 3rd, 1864, and by action on the case declared against the State National Bank of Boston, a banking association duly organized under the statutes aforesaid, and located at said Boston, as by the writ and declaration of record will appear, to which the defendant pleaded the general issue, which was joined; and thereupon the cause was continued from term to term, until the fifteenth day of October, A. D., 1868.

And afterwards the cause came on for trial before the said Circuit Court at said October term, before a jury empannelled for
18 that purpose, and the plaintiff then and there, to maintain and prove the issue on their part, submitted to the court and jury the evidence, as follows, to wit:

Franklin Haven testified as follows:

I am president of the Merchants' National Bank of Boston. The powers exercised by the president are very full and comprehensive, including the loan of money, discounts, and the general supervision of all the affairs of the bank; the president reporting and holding himself responsible to the directors for the performance of his duties. On Saturday, the 23rd day of February, 1867, the cashier of the bank, Mr. Fuller, said to me that Mellen, Ward & Company were going to purchase in New York a large amount of gold, perhaps some three or four hundred thousand dollars, and they desired to know if the bank would take the gold as it should come on from New York, and pay for it at the rate of $125 in currency for

every $100 of gold. I put the question to the cashier who the parties were who were to purchase so large an amount of gold. The cashier replied that he did not know; that he had put that question himself to Mellen, Ward & Co., or Carter, (I forget which of the firm he stated,) and that the answer was that the gold was to be purchased for responsible parties, who would be prepared to take it in the course of a few days, and that the gold when taken away and paid for at the bank would go through, probably, some other bank, mentioning, perhaps, the State Bank; whether it was said the whole amount was to go into that bank, or only a part of it, I don't recollect. It was only mentioned incidentally. I inquired of the cashier whether the bank could take so large an amount of gold; whether it had currency sufficient to take it and pay for it without interfering with the regular business. The cashier replied that the bank held a large amount of lawful money and currency quite sufficient to enable the bank to take in this amount of gold, and pay for it, without any interference with its regular discounts; and he mentioned among the currency or lawful money held by the bank a large amount of what was popularly called clearing-house certificates, which were certificates for money loaned to the United States on interest, but which no longer bore interest, the Secretary of the Treasury having notified the holders of the certificates that they would be paid on presentation, and would bear no interest after a certain date. Those certificates were held by the bank to the amount of some hundreds of thousands of dollars, for convenience in paying its balances in various settlements through the clearing-house. They were considered as lawful money by law; so considered and so held. I stated to the cashier that he might take the gold and pay for it, but that I desired him to be (as the amount was large) very careful in the examination and weighing of the gold. I stated to the cashier that he could take the gold which would come on, carefully weighing it and counting it, and pay for it on the same terms that he had already several times taken gold from Mellen, Ward & Co. Mellen, Ward & Co. had, at times during the preceding two or three months, brought gold into the bank and received currency for it at the rate of $125 in currency for every $100 in gold. I said to the cashier that he could take the gold from them at the rate of $125, taking the gold and paying for it, in fact, purchasing the gold for the bank for $125 in currency for $100 in gold, and that he could give them the right to come in at any time afterwards (being on demand on the bank) and take gold from the bank, paying the bank for the gold $125 in currency for every $100 in gold; and such premium or compensation as would be equivalent to interest upon the amount invested by the bank in the gold since the time the bank had purchased that gold. I told him never to take any obligation, or memorandum, or note of any kind, but to rely entirely upon the purchase of the gold. The conversation about this purchase was on Saturday, the 23rd day of February. Between tea and eleven o'clock on the morning of Tuesday, the 26th day of February, the cashier came into my room and

told me that $200,000 in gold had come on from New York, and was in the Second National Bank, but that it was not in coin but in gold certificates. I said to the cashier that I knew that gold certificates were equivalent to gold, being used by law in the place of
21 gold, but that I was not familiar with them, and that before he took the certificates from the Second National Bank he had better go to the subtreasury and ascertain their correctness. On the next day, Wednesday, the 27th of February, the cashier came to me and said that $200,000 more had come on in gold certificates, and were at the Second National Bank. I told him that before paying for them he had better take them also to the subtreasury and see that they were correct.

(The two checks, copies of which, marked A and B, are hereto annexed, were handed to the witness, and he continued:)

The first time I saw these checks was a little after 12 o'clock, on Friday, the first day of March, 1867. I took the checks in my hand, a little after one o'clock, on Friday, the 1st day of March, 1867, and presented them to the cashier of the State Bank. I said to him, "I thought you were coming in to pay the gold for these checks early this morning." (Question: To pay the gold?) Ans. "To pay the money;" I didn't say "gold;" "to pay the money on these checks early in the morning." The cashier replied, "Yes, I am going out now to attend to it, and get the money." "Get the money," said I; "didn't you have the money—the gold; were not the gold certificates delivered to you?" "Yes," said he; "I had them here, but they are not here now. I am going out to get it, and will
22 come in and attend to it." I spoke rather abruptly and said he should do it immediately. He looked up and said, "You hold the State Bank." I came back and laid the checks on the desk of the teller. About a quarter before two o'clock I took these checks into the directors' room of the State Bank. There were three or four gentlemen present; either Mr. McGregor, (who was a former president of the bank,) or Mr. Dana, introduced me to the president of the bank, Mr. Stetson. I presented the checks to Mr. Stetson, the president. Mr. Stetson took the checks and deliberately read them, one by one, aloud to his directors, and those gentlemen who were present. He then said to me that they had not authorized their cashier to certify checks. He turned to Mr. McGregor and said, "Have we, Mr. McGregor?" Mr. McGregor made no reply. I then said, "He has certified checks, and those checks were given to the cashier of the Merchants' Bank for gold delivered to him, the property of the Merchants' Bank," and I wanted payment for that gold. The gentlemen were considerably excited, and I wanted action. I said to them, "I have just heard that there is trouble at the subtreasury. I think you had better go down there; perhaps you will find your gold there, and, if you wish it, I will go with you." The gentlemen went, two of them, Mr. Stetson, the president of the bank, and Mr. McGregor, the ex-president, and
23 we entered the room of the assistant treasurer. I think I introduced them, saying to the assistant treasurer, "These gen-

tlemen have come in to see if there has not been a large amount of gold placed to the credit of the State Bank."

Question. Is there any usage known to you, and if so, what is it, in regard to the cashiers of banks?

(The court. Admitted, de bene esse, subject to the future determination of the court as to its admissibility and legal effect.)

Q. State whether there is any usage of the banks in the city by which the cashiers are authorized to issue checks, or obligations, or memoranda, or anything, and if so, whether it is universal or limited; is there, or is there not, any usage among the banks of this city by which the cashier of a bank can give its obligation, and if so, under what circumstances, and is it universal or limited.

A. There is such a usage prevailing among the banks of this city in transactions directly between the cashiers of the respective banks, in borrowing money of each other, or in obtaining New York funds, or in other large operations, by which the cashiers give to each other some voucher or evidence of the debt. For instance, if one bank borrows of another bank, which is of daily occurrence, $50,000, or $100,000, the borrowing bank cashier gives to the bank loaning the money some evidence of that debt, and that evidence is sometimes
24 given in a check on the bank drawn by the cashier on the bank of which he borrows the money, sometimes in his own check upon his own bank, sometimes in a mere slip of paper stating on it, "credit such a bank so much money," signed with the initials of the cashier; but I cannot state all the forms in which it is done; the cashiers vary them between the banks, but whether the checks are certified or not, I cannot state—the checks given on each other—fully.

Q. In your own bank, have very large or very small amounts been subject to that usage?

A. Very large amounts.

Q. How large?

A. Well, sir; in 1867, the amount of money loaned by the Merchants' Bank to other banks amounted to $4,774,000, during the year, in various sums. Those loans were made exclusively by the cashier.

Q. What certificates were given, and who by?

A. The bank that borrowed the money would give, as I have stated, some evidence for it.

Q. Is there any by-law of your bank authorizing your cashier to do that, or borrow or lend in that way, or does it result from his general authority?

A. No vote of the kind was ever passed by the directors of the bank.

On cross-examination the witness testified:

Q. I want to call your attention to this subject of usage, of
25 which you have last spoken. These transactions, as I understand you to have stated, are transactions between cashiers; the president of the bank has nothing to do with them?

A. They have the controlling power; he could stop them if he liked.

Q. We were not speaking about power. That is a matter of judgment. I am talking about facts and usages. Does the president of a bank participate himself in this usage of borrowing which you have been speaking of?

A. I never have.

Q. Not even to the extent of directing your cashier how much and what to borrow, when you had occasion to borrow?

A. The cashier has full authority from me to borrow on all occasions when necessary.

Q. He has that general authority from you?

A. General authority; yes, sir.

Q. Not by any writing, I suppose, but by your having told him so?

A. Yes, sir.

Q. Now to go back to the facts; you don't personally participate in these transactions?

A. I don't, sir. They are known to me, but I don't take any action myself.

Q. How are they known to you?

A. The cashier states to me, not always, and then I look after the settlements of the book in order to ascertain the ability of the bank to discount from time to time, and they are necessarily known to me.

26 Q. You necessarily know the loans which your bank has made, or the sums which it has borrowed?

A. Not the particular loan; but I know the condition of the bank. It is my duty to know the condition of the bank every day.

Q. But that condition is the general result, which you are aware of, of loans and borrowings and of various other transactions, and you don't look into the details of the items which constitute that condition, if I understand you?

A. I do sometimes. The state of the bank is laid before me every day. I watch the settlements of the bank through the clearing-house day after day. In the movements of large amounts of money, a bank may be very rich, so termed, and suddenly stand in need of money, borrowing money in order to pay its balance through the clearing-house. It may be to-day a debtor bank for one or two hundred thousand dollars, and to-morrow a creditor bank.

Q. Who ascertains whether it is a debtor bank and has occasion to borrow?

A. The cashier determines that.

Q. Who ascertains whether it is a creditor bank and in a condition to lend?

A. I ascertain that.

Q. You do that?

A. Yes, sir.

Q. Then the cashier does not lend without authority from you?

27 A. In some cases during my absence and on certain security, government bonds, for instance.

Q. I am speaking of lending to other banks; that is what you have been speaking of. Who ascertains whether the bank is a creditor bank and in a condition to lend to other banks?

A. The cashier.

Q. You do not participate in that?

A. No, sir; not necessarily.

Q. What means have you of personal knowledge of the securities which the cashier takes when he makes a loan, the cashier of your bank takes when he makes a loan to other banks?

A. I don't know that he takes securities.

Q. By "securities" perhaps I use a wrong word. We will call it evidences of debt, the evidences of loan. What means have you of knowing what evidences of loan the cashier takes when he makes loans to other banks?

A. Such as have resulted from observation; information which I can't help getting one way and another in being there constantly, and sometimes seeing the checks which are received for loans so made.

Q. That is, in your own bank, is it not?

A. Yes, sir.

Q. So far, then, as you have any personal knowledge bearing upon the question of what the cashier takes as evidence of loans to other banks, your information is derived from an occasional inspection of your own bank?

28 A. From the general knowledge I have acquired, I can't tell you how, of how such things are done, as to the mode existing, or the prevailing mode between the banks.

Q. What personal knowledge have you of any mode out of your own bank?

A. I don't know that I have any, sir.

Q. Now, I want to know what securities, what evidences of debt are within your personal knowledge, as taken by your cashier for loans made to other banks; what evidences of debt are within your personal knowledge.

A. Within by personal knowledge, going back for some years, you mean, or any time?

Q. You must begin with Feb., 1867. You must begin then. I mean you must begin to go back of that. Anterior to the time of this transaction, what personal knowledge have you of the evidences? I ask now the general question. I want to put a preliminary inquiry to Mr. Haven, so we may have the points of time right. Mr. Haven, when was the Merchants' Nat'l Bank organized?

A. In July, 1864.

Q. Now, sir, confining yourself to the period between July, 1864, and March, 1867, I wish to inquire what personal knowledge you had concerning the evidences of debt given to your cashier for loans made to other banks; what evidences of debt in that time you knew to be given from personal knowledge.

29 A. I cannot say that I saw any of these particular evidences. I knew as to the general form.

Q. My question is, what personal knowledge you had, from seeing the papers that were given, of the evidences of debt given by one cashier—any cashier—to your cashier for loans?

A. I have seen the checks drawn by the cashiers of other banks on the Merchants' Bank, paying for loans.

Q. I want to stop there, and ask a question about that, so as to have it fairly understood. If the cashier of another bank comes to your cashier for a loan, I understand you to say you have seen checks drawn by that cashier on the Merchants' Bank for the amount of the loan?

A. I have seen them passing through the teller's hands. That is the only way I have seen them.

Q. You have seen such papers; a considerable number of them, I suppose?

A. I don't recollect any number; I only know I have seen some.

Q. Well, now, when that loan is repaid, what is done by your cashier in respect to drawing any paper? He has, as I understand you, this draft on him which he has paid, and he returns that as a voucher?

A. That is one of the forms.

Q. I am speaking of that form. What does he do when he wants to be reimbursed; what does your cashier do?

A. I can only suppose a case, and then I can tell you what he would do.

30 Q. I am speaking of your knowledge.

A. If a check was drawn on the Merchants' Bank, that would be charged to the bank drawing the check.

Q. And what would then be done with it?

A. Then the cashier of the Merchants' Bank, in the ordinary course of business, would draw his check upon that bank in return.

Q. You have not quite gone through with the detail of the check in your bank; it is handed to your cashier, I suppose, in the first instance?

A. It may be to the teller; most likely, under the direction of the cashier.

Q. It goes into the hands of the teller, does it?

A. I suppose so.

Q. Do you know?

A. That is the proper place for it to go.

Q. Have you personal knowledge about it?

A. Yes, sir.

Q. It goes into the hands of the teller; what does he do?

A. He either holds the check in his cash, or charges it on the books of the bank. If he charges it, then the cashier would draw against that check. I can tell you why there has been a variation in holding the check or not, if you wish it stated.

Q. I don't think it is material in this stage of the case; I want to get at what is done. The reason why it is done is not material at

present. You have stated one form in which such a loan is evidenced. What other forms between the dates I have men-
31 tioned, since the organization of the Merchants' Nat'l Bank down to March, '67—what other forms of evidence of debt have you personal knowledge of?

A. I can't say I have any personal knowledge.

Q. To come to another subject than loans; what other transactions between cashiers of banks did you refer to as being within your personal knowledge? You have spoken generally of large operations, and I want to know what the transactions are, if any, which are, within your personal knowledge, between the cashiers of banks?

A. Such as the borrowing of money, or the purchasing of New York funds, which are frequently wanted in large amounts by the banks.

Q. Anything more than that?

A. I don't recollect; I have no personal knowledge of transactions between cashiers beyond what I have stated.

Q. Now, this matter of purchasing New York funds, how is that done in your bank, where your personal knowledge is?

A. Not done by me; it is done by the cashier.

Q. Have you personal knowledge how it is done?

A. I can't say by personal knowledge; I have an idea how it is done.

Q. Then you can't tell us, when one cashier from outside your bank buys New York funds of your cashier, you can't tell us how it is done?

A. No, sir.

32 Q. And these are the two classes of operations which you have spoken to on this subject of usage, borrowing money and buying New York funds?

A. Yes, sir; and selling.

Q. Well, sir; buying them of your bank, that would be selling them, of course; there cannot be a purchase without a sale.

A. Yes, sir.

Q. After these transactions became public, was your bank examined by the order of the Comptroller?

A. Yes, sir.

Q. By whom?

A. By Mr. Ransom and Mr. Turner.

Q. Please state what Mr. Ransom and Mr. Turner are.

A. Mr. Ransom is a gentleman that examines the national banks under the direction of the Comptroller of the Currency. He usually examines them once a year, each bank; oftener if necessary. Mr. Turner was associated with Mr. Ransom at this particular examination of the bank. This was the annual examination of the bank, made by Mr. Turner, in April, I think, 1867.

Q. Mr. Turner is not a government officer; he is president of a bank, is he not?

A. I suppose he was specially appointed at the time by the government.

Q. After this transaction, Mr. Haven, and quite soon afterwards, say about the 23d of March, did you have occasion to
33 write a letter to the Comptroller upon the subject of the contracts of your bank with Mellen, Ward & Co., in respect to these gold certificates?

A. I wrote to the Comptroller of the Currency in answer to a question he put.

Q. You had occasion to write a letter?

A. Yes, sir.

Q. I want to show you a copy, or what I suppose to be a copy, because it is certified as such from the public archives, and ask you if you recollect writing that letter.

A. (After examining copy referred to, hereto annexed, marked D.) I think that that is a copy of the letter.

Q. I want to ask Mr. Haven, now—the date of this letter purports to be 22d of March—I want to ask whether the facts which he thus stated to the Comptroller * * *. The question I wish to put to you—you have read the letter, I suppose—is whether the facts which are stated in this letter written on the 23d of March to the Comptroller are true?

A. The facts you will allow me to state ———

Q. I want you to answer my question whether the facts that are stated in this letter are true? (reading) "I have this day received your letter of the 21st inst." You did receive such a letter, I suppose?

A. Yes, sir.

Q. (Reading) "And in reply thereto, I have to state, that on the 26th day of Feb., 1867, the cashier of this bank made an ad-
34 vance to Mellen, Ward & Co. of $250,000 in legal-tender notes and currency upon $200,000 in gold certificates." Is that true?

A. I must state the reasons of my writing that. It is true. We did take the certificates, and that we made an advance upon them. We received, as I have stated, the gold certificates, and paid for them. I may have termed it an advance there.

Q. Then the next passage is this, (reading:) "No note or other liability was taken from the parties for the amount of this advance." Is that true?

A. Yes, sir, that is true.

Q. Is this true? (Reading:) "A check for $50,000 by way of a memorandum was given by the parties to whom the advance was made, to be kept in the teller's cash, in order to balance his cash account." Is that true?

A. That was not known to me at the time the transaction was made. If you will permit me to explain———

Q. Then you don't know whether that was true or not?

A. I don't know whether that is true or not; but that is what was stated to me afterwards by the cashier.

Q. Then this you stated from information?

A. From information from the cashier.

Q. (Reading.) "On the 27th of Feb., a similar advance upon
35 gold was made by the cashier for the same amount to the same parties, and in the same manner in all particulars, no note or other obligation for the amount of this advance being taken." When you say "in all particulars," you mean to make the same qualification, that you got those particulars from the cashier. (Reading:) "Prior to the 26th of Feb. the same parties had deposited in the bank about $90,000 in gold"—deposited it in the bank—"receiving therefor currency at the rate of 125 for the 100 of gold; no note or other obligation was given on account of the same." Was that true?

A. It was taken there on deposit or on exchange, taken and paid for by currency. They kept no deposit account.

Q. Do you say, then, that the same parties did not deposit $90,000 in the bank, receiving therefor currency at the rate of 125 for 100?

A. They did not keep a regular deposit account; I used the term; I wish to qualify that. I wish to state the transaction precisely as it was, however I may have written it there. I used the term "deposited" as equivalent to "exchanged." They had no deposit account at the Merchants' Bank.

Q. This does not say they did?

A. That would be the inference.

Q. It says they deposited in the bank about $90,000 in gold, receiving therefor currency at the rate of 125 for 100 gold?

36 A. We took it as our own and paid for it.

Q. You took it and paid for it?

A. Yes, sir; and treated it precisely like the gold of the bank.

Q. That you will not state now. You say you took it and paid for it. Had you any personal knowledge of the transaction as between the cashier and Mellen, Ward & Co.?

A. Only what the cashier told me.

Q. Then you know nothing of the bargain which he actually made with Mellen, Ward & Co.?

A. Nothing more than he told me and what I told him.

Q. Did the cashier give you information before you wrote this letter?

A. I derived that information principally from the cashier.

Q. And deriving your information from the cashier, you stated that Mellen, Ward & Company had deposited in the bank about $90,000 in gold, receiving therefor currency at the rate of 125 for 100.

A. That appears to be term I used.

Q. This was in consequence of information the cashier gave you of what the bargain was?

A. The cashier told me what he had done and done in accordance with my authority to him.

Q. (Reading.) "Gold certificates to the amount of $420,000,
37 upon which advances as above stated had been made, were withdrawn from this bank on the next day, Feb. the 28th, at half-past one o'clock, by delivery thereof by the cashier of this bank, at the request of the parties to whom the advances had been made,

to the cashier of the State National Bank, by taking them in person and delivering therefor to the cashier of this bank two checks of the said parties upon the State National Bank, amounting to $525,000, certified as good, on the spot, by the cashier of the State National bank." Is that a correct statement?

A. On information derived from the cashier.

Q. Correct according to the information which was derived from the cashier. "On the same day, Feb. 28, at about half-past two o'clock, after Mr. Fuller, the cashier, had left the bank, the cashier of the State National Bank, in company with Mr. Carter, of the firm of Mellen, Ward & Co., again appeared at the counter of this bank and received from the teller of this bank $60,000 in gold and gold certificates, he, the cashier of the State National Bank, delivering therefor to the teller the check of Mellen, Ward & Co. on the State National Bank for $70,000, certified by him as the cashier as good." Witness. $75,000.

Q. It reads here 70,000. That is a mistake. It is obviously a mistake, may be a mistake in the copy, or you may have made a
38 mistake. I wish to ask whether, according to the information received by you from the cashier, that was a correct statement?

A. The information I received from the teller, also.

Q. (Reading.) "These transactions in our view are not deemed to be within the 29th section which we supposed did not apply to advances of this character, but was designed to exclude loans involving personal responsibility of the borrowers, and the proviso of the section seems to indicate that such is the true construction. I trust you will concur with us in this view. In reply to the other portion of your letter, I have to state that the cashier of this bank is not in the habit of giving his own check upon the bank endorsed by the teller in payment of checks drawn by depositors, instead of paying the money on such checks. No such transaction has ever occurred in this bank, to the knowledge of the president or the directors.

"Very respectfully, yours,

"FRANKLIN HAVEN, *Pres.*

H. R. Hubbard, esq., Comp. of the Currency, Washington, D. C.

Q. You have already stated you wrote that?

A. Yes, sir.

Q. I understand you to state that you get your knowledge of the usages of banks from general information as president of the bank?

39 A. Yes, sir.

Q. You stated that sometimes these cashier's checks go into the teller's cash; what becomes of them when they go into the teller's cash, sir; where are they sent?

A. They either are held in the teller's cash or go into the books and are charged to the banks; generally they are charged to the banks.

Q. When they are kept in the teller's cash what becomes of them?
A. They constitute part of the cash.
Q. How are they paid?
A. Paid by the borrower, either by credit through the clearing-house or by check on his own bank, or some other way.

George H. Davis testified as follows: I am the paying teller of the Merchants' Bank. From about the 1st of January, 1867, and previous to the 23d of February, the bank several times received gold or gold certificates from Mellen, Ward & Co., for which it paid currency at the rate of $125 for $100 in gold. At that time they had deposited in the bank about $90,000 in gold. No note, memo
or check was taken connected with it in any way. The go
added to the gold of the bank; on my cash book it was added to t
of gold, and the gold was mixed with the gold of the b
40 the vault. If it consisted of certificates, they were pu
pocket-book kept in my trunk with other certificates and bills.
(The paying teller's book was put in, and from the entries in it on the 26th, 27th and 28th of February, 1867, it appeared that the gold received from Mellen, Ward & Co., was added to the gold of the bank.)

When I paid out $125 in currency for every $100 in gold I kept a memorandum of the amount of the premium (25 per cent.) in my cash; a statement of the amounts and dates. We charged as compensation what would be equivalent to interest on the whole amount of currency paid out. I have no recollection of any memorandum or check or obligation of any description when the gold certificates came into the bank, but I made a memorandum of the excess of the currency over the gold on some slips in my cash at the time; tho
are not now in existence. On Thursday, the 28th day of Fe
Mr. Fuller, the cashier of the Merchants' National Bank, came
to my desk on the inside of the counter; on the outside w
cashier of the State National Bank, accompanied by Mr. Cart
handed Mr. Fuller $420,000 of gold certificates, 84 of $5,000
He counted them to see that there was the correct amount
passed them over to the cashier of the State Bank. He handed
41 him two checks drawn by Mellen, Ward & Co. on the State National Bank, one for $250,000, the other for $275,000, certified "Good, C. H. Smith, cashier." Mr. Fuller handed them to me; I changed them over to the receiving teller to be added to his settlement of that day against the Boston banks.

The papers hereto annexed, marked A and B, were handed to the witness, and he identified them as the two checks which he then received, and they were put in as evidence of a part of the transaction; they were as follows:

$250,000. BOSTON, *Feb'y* 28, 1867.

State National Bank pay to J. K. Fuller, cashier, or order two hundred and fifty thousand dollars.

MELLEN, WARD & CO.

Good: C. H. SMITH, *Chr.*
Endorsed: J. K. Fuller, cashier.

to the cashier of the State National Bank, by taking them in person and delivering therefor to the cashier of this bank two checks of the said parties upon the State National Bank, amounting to $525,000, certified as good, on the spot, by the cashier of the State National bank." Is that a correct statement?

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Q. (Reading.) "These transactions in our view are not deemed to be within the 29th section which we supposed did not apply to advances of this character, but was designed to exclude loans involving personal responsibility of the borrowers, and the proviso of the section seems to indicate that such is the true construction. I trust you will concur with us in this view. In reply to the other portion of your letter, I have to state that the cashier of this bank is not in the habit of giving his own check upon the bank endorsed by the teller in payment of checks drawn by depositors, instead of paying the money on such checks. No such transaction has ever occurred in this bank, to the knowledge of the president or the directors.

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A. Yes, sir.

Q. I understand you to state that you get your knowledge of the usages of banks from general information as president of the bank?

39 A. Yes, sir.

Q. You stated that sometimes these cashier's checks go into the teller's cash; what becomes of them when they go into the teller's cash, sir; where are they sent?

A. They either are held in the teller's cash or go into the books and are charged to the banks; generally they are charged to the banks.

Q. When they are kept in the teller's cash what becomes of them?
A. They constitute part of the cash.
Q. How are they paid?
A. Paid by the borrower, either by credit through the clearing-house or by check on his own bank, or some other way.

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40 the vault. If it consisted of certificates, they were put in a pocket-book kept in my trunk with other certificates and bills.

(The paying teller's book was put in, and from the entries in it on the 26th, 27th and 28th of February, 1867, it appeared that the gold received from Mellen, Ward & Co., was added to the gold of the bank.)

When I paid out $125 in currency for every $100 in gold I kept a memorandum of the amount of the premium (25 per cent.) in my cash; a statement of the amounts and dates. We charged as compensation what would be equivalent to interest on the whole amount of currency paid out. I have no recollection of any memorandum or check or obligation of any description when the gold certificates came into the bank, but I made a memorandum of the excess of the currency over the gold on some slips in my cash at the time; those slips are not now in existence. On Thursday, the 28th day of February, Mr. Fuller, the cashier of the Merchants' National Bank, came down to my desk on the inside of the counter; on the outside was the cashier of the State National Bank, accompanied by Mr. Carter. I handed Mr. Fuller $420,000 of gold certificates, 84 of $5,000 each. He counted them to see that there was the correct amount, and passed them over to the cashier of the State Bank. He handed
41 him two checks drawn by Mellen, Ward & Co. on the State National Bank, one for $250,000, the other for $275,000, certified "Good, C. H. Smith, cashier." Mr. Fuller handed them to me; I changed them over to the receiving teller to be added to his settlement of that day against the Boston banks.

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$250,000. BOSTON, *Feb'y* 28, 1867.

State National Bank pay to J. K. Fuller, cashier, or order two hundred and fifty thousand dollars.

MELLEN, WARD & CO.

Good: C. H. SMITH, *Chr.*

Endorsed: J. K. Fuller, cashier.

$275,000. BOSTON, *Feb'y* 28, 1867.

State National Bank pay to J. K. Fuller, cashier, or order, two hundred and seventy-five thousand dollars.

MELLEN, WARD & CO.

Good: C. H. SMITH, *Chr.*

Endorsed: J. K. Fuller, cashier.

Mr. Davis further testifies as follows: About half-past two on the same day Mr. Ward opened the door, came in and said
42 "We shall want some more gold," and immediately left the bank; but a few minutes after that the cashier of the State Bank came in, accompanied by Mr. Carter, went to the desk on the outside of the counter for the customers of the bank, against the wall, and remained there long enough to write his name; came and handed me a check for $75,000, signed by Mellen, Ward & Co., drawn on the State Bank, and certified by him to be good.

(The paper annexed, marked C, was handed the witness.)

Question. Is that the paper, sir?

Ans. I should say it was.

Qu. Who did you say presented you that check?

Ans. The cashier of the State Bank.

Qu. What did he say to you, or what did he require of you, if anything?

Ans. I don't recolloct of any conversation. The check called for $60,000 in gold. At the part of the bank where my desk was I had in my possession at that time $10,000 in gold certificates, two certificates of 5,000 each, and four bags of gold lying on the counter back of my desk of $5,000 each, making $20,000 in gold and $10,000 in certificates. The certificates I handed to Mr. Smith, and passed the gold out over the counter, $30,000 in all. Mr. Carter carried off the gold; I don't know whether he took the certificates or not. He went out with the gold, and I proceeded down to the vault,
43 Mr. Smith going down in the same direction outside the counter. I took six bags of gold out of the vault of $5,000 each, making $30,000, and placed them on the outside of the counter and left them there in charge of Mr. Smith, cashier of the State Bank; delivered them to him; laid them on the floor.

Qu. Who did you deliver the two other certificates and gold to?

Ans. I delivered the certificates to the cashier of the State Bank and passed the gold over the counter, as is customary when gold is delivered.

Qu. He standing there?

Ans. He standing there.

(C) previously identified by this witness. The check identified was put in evidence, and was as follows:

$75,000. BOSTON, *Feb.* 28, 1867.

State National Bank pay to gold or bearer seventy-five thousand dollars.

MELLEN, WARD & CO.

Good: C. H. SMITH, *Cashier.*

Qu. Was Mr. Fuller in the bank when they came in to get that gold?

Ans. Mr. Fuller was not there.

Qu. Did you communicate that transaction to Mr. Fuller, or see him again that day?

Ans. No, sir.

44 Qu. How came you to part with that gold and take such a piece of paper as that?

Ans. I delivered the gold to the cashier of the State Bank.

The three checks which were received on that day, the 28th, I passed over to the receiving teller on the same day, and charged them to him on my book. He added them to his list of checks against the Boston banks, which came into my possession again the next morning, as part of the charges against the clearing-house. This is the slip that was sent in against the State Bank on the morning of March 1st.

Exchange slip, No. 4, State. From No. 13, Merchants' National, 186 :

15	79
575	
484	26
250,000	
275,000	
68	
75,000	
601,143	05
350	
251,143	05
250,	
1,143	05

Mr. Davis also testified that previous to the hour when the
45 gold was taken out of the bank, on the 28th of February, Mellen, Ward & Co. had on the same day brought into the bank $20,000 in gold, which was added to the gold of the bank, and that he paid them for it $25,000 in currency; that he had received this gold under the general directions of the cashier, paying for it at the rate of $125 in currency for $100 in gold, keeping the premium on his memorandum, and adding the gold to the gold of the bank; that he kept an account of the date of each transaction, for the purpose of reckoning the interest or premium, and a memorandum to make his cash right.

Qu. Who applied to you to get the gold on the afternoon of the 28th?

Ans. Previous to the cashier of the State Bank coming in Mr. Ward came in and said, "We shall want some more gold." And then the cashier of the State Bank and Mr. Carter came in, and the cashier o

the State Bank handed me a check for $75,000, and I passed him out $10,000 certificates and four bags of gold over the counter.

Qu. You did not pass them out without any request? Did you pass them without any request or not?

Ans. The check called for $60,000 in gold. (Interrupted by Mr. Curtis, counsel for the defendants. He has previously stated that he did not remember that Mr. Smith said anything.)

Qu. How is that, Mr. Davis?

46 Ans. I don't recollect any particular request in words. I think there must have been a call for $60,000 in gold.

Qu. I understood you to say that Mr. Carter took away the first gold you brought out, leaving Mr. Smith in the bank?

Ans. Yes, sir.

Qu. The remaining part was passed to Mr. Smith alone?

Ans. Yes, sir; laid outside the gate under his charge. He was the only person there.

Q. Is there, or not, any usage known to you among the banks of this city with regard to cashiers borrowing money and giving checks for it, or binding the bank by their obligations?

A. There is a custom of banks dealing with one another through their cashiers.

Q. Are transactions of that description to your knowledge numerous or few?

A. Numerous.

Q. In what form were memorandums given by cashiers in that case? Is there an established form, or are there various forms, when one cashier wants to borrow money of another?

A. The cashier of the Merchants' Bank, borrowing money, draws a check on the Merchants' for the amount he wants to borrow. Sometimes the check is payable to the order of the teller of the

47 bank borrowing the money, sometimes payable to no order.

Q. Are there not blank checks for that transaction? Have you ever seen a printed form for cashiers' checks?

A. They are regular checks, drawn on the bank.

Q. I mean where there is a borrowing of money from cashier by cashier, is there not a printed form known to you?

A. No, sir; no particular form. The checks I have seen are the same as they would use if they were to draw a check on New York or any other place.

Q. Are they for large or small amounts?

A. Never for very small amounts; that is, less than $5,000, according to the needs of the bank.

Q. From that ranging up to what?

A. I don't know any limit to the amount, except the limit of the means of the bank to loan.

Q. Well, take the maximum which you have known to be borrowed by a cashier of one bank from another bank, he giving a check for it, according to your best memory. I don't expect you to be very exact, but as near as you can.

A. I don't know any particular amount.

Q. How large an amount have you known to be borrowed at any time? Can you recollect anything to show the magnitude or the insignificance of these transactions?

48 A. They may be 200 or $300,000 in amount.

Q. On a single bank?

A. Yes, sir. I have no knowledge of any particular case at this moment.

On cross-examination the witness testified as follows $400,000 certificates I received from Mr. Fuller, the cashier Merchants' National Bank. He brought them in from the National Bank.

Q. And handed them to you?

A. And handed them to me.

Q. You did not know where he got them?

A. I didn't go down with him to the Second National Bank.

Q. Do you know where he got them from personal knowledge?

A. From hearsay.

Q. All you know is, he handed them to you in the bank?

A. Yes, sir.

Q. And the gold that was brought into the bank, was that handed to you or to the receiving teller?

A. To me.

Q. And by whom?

A. By Mellen, Ward & Co., or their employee.

Q. Now, sir, you understood, did you not, that Mellen, Ward & Co. had the right to come to you, and if they paid $125,000

49 in currency, had the right to receive $100,000 in gold? You understood that, didn't you?

A. If we had previously received that amount of them, yes sir.

Q. What was there on the books of the Merchants' Bank, or on any memorandum, or in any form of writing, to show that that right existed on the part of Mellen, Ward & Co.?

A. Nothing at all.

Q. The transaction, then, between the bank and Mellen, Ward & Co., whatever it may have been, whatever may have been its legal character, was in no manner recorded or evidenced in the bank? Is that true?

A. Except that my memorandum that I kept of the premium paid out on the gold showed me the state of the case.

Q. I ask you whether this right, which Mellen, Ward & Co. had to come and pay $125 currency and receive $100 gold, whatever may have been its legal character, was in any manner evidenced or recorded on the books of the bank or in any other way?

A. Not to my knowledge.

Q. Do you know of any checks of Mellen, Ward & Co., unpaid, now remaining in the bank?

A. No, sir.

Q. Have you had in your possession, at any time, any checks

50 of Mellen, Ward & Co. to be counted as cash by the direction of the cashier?

the State Bank handed me a check for $75,000, and I passed him out $10,000 certificates and four bags of gold over the counter.

Qu. You did not pass them out without any request? Did you pass them without any request or not?

Ans. The check called for $60,000 in gold. (Interrupted by Mr. Curtis, counsel for the defendants. He has previously stated that he did not remember that Mr. Smith said anything.)

Qu. How is that, Mr. Davis?

46 Ans. I don't recollect any particular request in words. I think there must have been a call for $60,000 in gold.

Qu. I understood you to say that Mr. Carter took away the first gold you brought out, leaving Mr. Smith in the bank?

Ans. Yes, sir.

Qu. The remaining part was passed to Mr. Smith alone?

Ans. Yes, sir; laid outside the gate under his charge. He was the only person there.

Q. Is there, or not, any usage known to you among the banks of this city with regard to cashiers borrowing money and giving checks for it, or binding the bank by their obligations?

A. There is a custom of banks dealing with one another through their cashiers.

Q. Are transactions of that description to your knowledge numerous or few?

A. Numerous.

Q. In what form were memorandums given by cashiers in that case? Is there an established form, or are there various forms, when one cashier wants to borrow money of another?

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Q. Do you know of any checks of Mellen, Ward & Co., unpaid, now remaining in the bank?

A. No, sir.

Q. Have you had in your possession, at any time, any checks

50 of Mellen, Ward & Co. to be counted as cash by the direction of the cashier?

A. I have no recollection of any such checks.

Q. Did you not have a check of Mellen, Ward & Co., at some time, for $50,000, in connection with these gold transactions and the certificates?

A. I don't recollect having any.

Q. You don't recollect whether you did or not; is that your answer?

A. Yes, sir.

Q. You don't mean to say, then, that you did not have such a check?

A. No, sir.

Q. When you delivered this specie, after the cashier had left the bank on the 28th, you delivered $60,000 in certificates and bullion, coin; you first took out $30,000, I understand, and delivered that, and Mr. Carter took that and carried it away?

A. He carried away the gold.

Q. Do you know who carried away the certificates which you then delivered?

A. I handed them to Mr. Smith, cashier of the State Bank.

Q. But you don't know whether he handed them over to Mr. Carter or not?

A. No, sir.

Q. Now the second $30,000; was that in gold certificates?

A. That was in gold.

51 Q. Exclusively in gold?

A. Yes, sir.

Q. When you handed it out, you have stated that Mr. Smith alone was present?

A. Yes, sir.

Q. Did Mr. Ward, or Mr. Mellen, or Mr. Carter come in before it was carried away?

A. Somebody came in; I don't know who; it is my impression that Mr. Mellen came in, but I am not certain. I had proceeded towards my desk to settle my cash, and left it in charge of Mr. Smith.

Q. Some third person did come in?

A. Yes, sir.

Q. He did assist in carrying away, or did carry away this gold?

A. I presume so. I did not see it carried away, because I left it in charge of the cashier of the State Bank.

Q. But it went away?

A. It went away.

Q. And this person who came in, you think was Mr. Mellen?

A. Yes, sir. That is my impression.

Q. That is your present recollection?

A. It was never very strong on my mind, but I always had the impression that it was Mr. Mellen who came in.

52 Q. And when the gold went out of the bank, those two persons, Mr. Smith and Mr. Mellen, (if it was Mr. Mellen,) went out of the bank?

A. Yes, sir.

Q. Now a word or two in regard to that slip. The slip appears to have had entered upon it these checks and some other sums as made up by you; then the amount of these checks deducted at two different times, as you have explained it. The effect, then, of sending in that slip against the State Bank to the clearing house was that day not to send in these checks, wasn't it?

A. Not to send them in through the clearing house.

Q. Well, did they remain in your possession?

A. Yes, sir; they remained in my possession.

Q. Until when?

A. Until the president of the bank—it was between twelve and one o'clock, I should say—until the president of the bank, Mr. Haven, took them, for the purpose of presenting them to the State Bank.

Q. No matter about his purpose, he took them?

A. He took them.

Q. What day of the month was it?

A. The first day of March.

Q. If I understand this slip, the only claim made by the Merchants' Bank on the State Bank through the clearing house on the morning of the first of March was for a small balance left after deducting these checks. Is that so?

A. Yes, sir; that is so.

53 Q. About $1,100?

A. Yes, sir.

Q. In whose handwriting are figures on that slip?

A. The figures previous to the deductions are in the handwriting of the receiving teller; the deductions are in my handwriting.

The counsel for the plaintiff then proposed to read from the records of the State National Bank, which the defendant had produced under an order of court, made upon the motion of the plaintiff under the 15th section of the act of September 24th, 1789, C, (1 U. S. St. at L 88.)

The 5th article of the articles of association, upon which the counsel of the defendant suggested that the entire document went in; the counsel for the plaintiff did not yield to this suggestion, and thereupon the presiding justice said: "The general rule of the court upon the subject is, that counsel offering a paper which is divided into sections or into articles, may read such portions as he deems material to his side of the case, but it lays the foundation for the whole to be put in by the other side if they see fit, or to put in other parts of the same paper in explanation."

The counsel for the defendant then suggested that the plaintiffs had called for the document and the defendants had handed it to them, and that that necessarily put it into the case.

But the court ruled that books and papers produced by order
54 of the court under the 15th section of the judiciary act are for the examination of the counsel calling for them, and that it does not put the paper produced into the case.

The counsel for the defendant then suggested that a part of a paper called for could not be read, and the court ruled as follows:

Upon this subject we do not desire to have any change in the principles of the court, or to have it understood that there is one principle on one occasion and another on another. At present it is settled, that when a party offers a paper which is, in his judgment, separable, and only a portion of it material to his case, he may read only that portion, but the whole paper is in the case, and the other side may read just such portions of it as they please. We have only one rule upon it, and we think the whole bar will agree that it is right.

The counsel for the plaintiff then read article 5 of the articles of association of the State National Bank, which is as follows:

The board of directors, a majority of whom shall be a quorum to do business, shall elect one of their number to be president of the association, who shall hold his office, unless he shall be disqualified or sooner removed by a two-thirds vote of the members of the board, for the term to which he was originally elected, and they shall have power to elect a vice-president, who shall be a member of the
55 board of directors, and to elect or appoint a cashier, and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them; to continue them in office, and dismiss them, as in the opinion of a majority of the board, the interests of the association may demand.

They also shall have power to define the duties of the officers and clerks of the association.

From the same book of records the counsel for the plaintiff also read "article 17th of the by-laws of the State National Bank, adopted on the 3rd of June, 1864," entitled—

Contracts.

All contracts, checks drafts, receipts, &c., &c., shall be signed either by the cashier or by the president, and all endorsements necessary to be made by the bank shall be made under the hand of the cashier or of the president, and in case of the temporary absence of both of the officers, the directors shall appoint one of their number to perform such duties during their absence.

After the reading of the foregoing article and by-law, the presiding justice said, "Now, the defendant's counsel may, at their election, read such portions of these papers, if the whole has not been read, as they may see fit, or they may wait until they open their case, which is the more usual course."

No part of the articles or by-laws was then read by the defendant's counsel.

56 John K. Fuller, the cashier of the Merchants' National Bank, testified as follows:

I am the cashier of the Merchants' National Bank, and have been

the cashier since its organization as a national bank; and before that I had been its cashier since 1853 or '54. On the afternoon of Friday, the 22nd day of February, 1867, Mr. Carter, of the firm of Mellen, Ward & Co., stated to me that his firm had received an order to purchase a large amount of gold, which he desired on behalf of his firm to purchase in New York, and he wished to know if the Merchants' Bank would take it on its arrival from New York and pay for it, as they had done on previous occasions, in taking gold from them. I replied to Mr. Carter, "Well, I don't know; I shall have to consult the president in regard to it." I asked him for whom they were purchasing so large an amount of gold. He said they were responsible parties, and when the gold was taken from the bank he thought it would go through some bank or banks, incidentally mentioning, perhaps, the State Bank.

(The counsel for the defendant suggested that this was no evidence to charge the State Bank in any way; and if it was offered for that purpose, they must object to it.

The court ruled that the evidence was admissible for the
57 purpose of showing the negotiation, but not to affect the State Bank, unless it was subsequently connected by other testimony.)

He said they wanted us to take the gold and pay for it, and it would be taken away again in a few days, mentioning, perhaps, the last day of the month, or the first of the following month. Nothing more was said until the next day, Saturday. I then presented the matter to the president of the bank, stating in substance the application. Mr. Haven asked for whom they were purchasing so large an amount of gold. I replied, "I don't know; I put that question and they said they were responsible parties." Mr. Haven then said, "I don't know Mr. Fuller; this is a large amount. Can the bank do it without interfering with our regular course of business, regular discounts?" I reminded the president of the large amount of currency, legal tenders, and clearing-house certificates which were lying idle; that we could do it as well as not; that in no event could it reduce our legal reserves more than $100,000 in affording accomodation. Mr. Haven then replied, "Well, Mr. Fuller, if you think it is not going to interfere with our ability to make our regular discounts or loans, you can do it on the same terms precisely on which we have taken gold of them previously," adding, "When the gold comes to the bank be very careful in the examination of it,
59 and have it weighed and examined as usual, to see that it is all right." I communicated the result to Mellen, Ward & Co. either on that day, or on the Monday following, that the bank would afford them the accommodation; and Mr. Carter said he would telegraph to New York and order the purchase of an amount of gold. I don't know that he said how much. On Tuesday morning, the 26th of February, Mr. Carter came into the bank, and said to me, that there was $200,000, or 40 certificates of the value of $200,000 at the Second National Bank, and if I went down there and paid them $250,000 in currency, they would be delivered to me.

Qu. That is 25 per cent. advance?

A. Yes, sir.

I went to the president and stated to him that Mr. Carter had been in, and instead of gold coming from New York, it was gold certificates. Mr. Haven replied, "Well, I am not familiar with them, and before you pay for them, you had better take the gold certificates to the subtreasury, and see if they are all correct." I then went down to the Second National Bank, took the gold certificates and paid for them; I carried them to the subtreasury and ascertained that they were correct; then I returned with them to the Merchants' National Bank, handed them to Mr. Davis, the paying teller, and he added them to the specie of the bank. On the following day, Wed-
60 nesday, the 27th of February, Mr. Carter again came into the bank, and said that there was a like amount of certificates at the Second National Bank, which I could obtain upon the same terms as I obtained the gold on the day before. I informed the president, as before, that I understood there were 40 more gold certificates. He said, "Well, Mr. Fuller, you had better take them, as before, to the subtreasury, and ask if they are correct. I took them there and they were pronounced correct. I returned to the Merchants' Bank, gave them to the paying teller, and he added them to the gold of the bank, as on the previous day. On the first day, Tuesday, I paid for the certificates in legal tenders and currency. On the second day, Wednesday, I gave a credit on a little ticket—"Merchants' Bank credit Second National $175,000," signed by me as cashier, and some currency. This gold was received on the same terms as in former transactions. We had formerly taken gold from the firm. They asked if the bank would take gold and pay for it at such time as either party might wish—either the firm of Mellen, Ward & Co. or the Merchants' Bank, at $125 currency for $100 in gold, they paying the bank for the trouble, &c., a sum equal to the interest on the amount of currency loaned. I said that we would do it. When the gold was brought into the bank under that agreement, it was placed with the gold of the bank. No memorandum, note, check, or
61 obligation of Mellen, Ward & Co. was given or received. On the afternoon of Thursday, the 28th day of February, about half-past one o'clock, I should think, Mr. Carter and the cashier of the State National Bank came into the bank and came to my table. Mr. Carter said, "We have come in for the gold." Mr. Smith, the cashier of the State Bank, said, "We have come in to get an amount of gold;" and that he would pay for it by certifying these checks. Mr. Carter held two checks in his hands, as afterwards appeared. I didn't see them or know it at that time. He said he would pay for the gold by certifying the checks, when he saw that the gold was all right. I said, "Very well, Mr. Smith; you step to the paying teller." He went on the outside of the counter, of course, where he was, and I followed down the inside of the counter and said to the paying teller, "The cashier of the State Bank has come in to take some gold." The teller handed me the package and I counted them.

Qu. Counted what?

The gold certificates, and found there were 84. I said to the teller, "There are 84 in this package." Mr. Smith, who was outside, said, "That is the amount wanted; that is the amount of these checks." I said, "Very well." and they were passed out to Mr. Smith. He counted them, and then handed me two checks. The checks were drawn on the State National Bank, signed Mellen, Ward & Co., and certified as "good, C. H. Smith, cashier." He
62 certified them in the bank after the delivery and examination of the certificates. I handed the certificates of the State Bank personally; and he turned round, and went out of the bank.

Qu. Whether or not at any time, during that time, you made any application to Mr. Carter about any checks?

Ans. Never a word.

Q. Were there any checks or memoranda given by Mr. Carter in course of that day, $50.000, or any sum like that, at the time the gold was brought into the bank, on the 26th or 27th; was anything said about checks at the time gold was brought in?

A. No, sir; I never said a word.

Q. During the 26th or 27th, were there any memorandum checks given to you by Mr. Carter? And if so, state the circumstances.

A. Mr. Carter came into the bank at about the end of the day.

Q. Which day?

A. That was on the 26th, I think, sir. I saw him at the counter drawing some money for checks. I don't know what; I said to Mr. Carter, "For the mere purposes of a memorandum, suppose you give me a check for $50,000. Just draw one at the counter, behind you." I said, "Just draw a check of $50,000 on one of those checks behind you as a memorandum." Mr. Carter looked up and said,
63 "We have never done that before." I said, "I know you have not, but there is no particular use to be made of it, except as a memorandum." At my request, he signed and I took it, without any knowledge of the president, I ought to say.

Q. What bank was it drawn on?

A. The Merchants' National Bank.

Q. Had they an account there to draw upon?

A. No, sir.

Q. What did that $50,000 represent?

A. It was to show the item for the teller, the discrepancy between the amount of gold and the currency paid out, so as to settle his cash. I ought to answer, that I don't know that I ever made any use of it,

Q. Had the president any knowledge about that, or did he give you any direction to do that?

A. Not at all; I did it on my own responsibility.

Q. In the transaction of the 27th, was that something done or not?

A. I think it was.

Q. The president knew nothing of that transaction?

A. No, sir.

Q. What was the amount of the checks?

A. $50,000 each, if I took two. I have no knowledge; I can't swear whether I took two checks or not.

Q. What did you do with it?

A. I either gave it to the teller, or laid it back in the trunk.

64 Q. What is the usage between banks in borrowing money or giving checks, if any usage is known to you to exist? Who makes the contract, and who signs the check?

A. By the cashier, they are generally; almost universally, I may say.

Q. What did you state the usage to be?

A. By the cashiers, the universal custom.

By Mr. Curtis:

Q. To do what?

A. To make the transactions of bank with bank.

Q. Does he sign the obligations or not?

A. Yes, sir.

Q. In a transaction between bank and bank, is there or not any usage as to who does the transaction, and who carries on the transaction, and who gives the obligation of the bank?

A. The cashier.

Q. In transaction between banks, and in regard to borrowing money, or anything else that pledges the credit of a bank, is there a usage as to what officer of the bank conducts those transactions?

(This was objected to, and the court ruled as follows:

"The court recognizes the rule fully that a question that calls for legal testimony, if it also calls for that which is illegal, must be excluded on account of the infirmity of the question itself. It is doubtless in that view of the law that the objection is made. The court has difficulty in applying that in this case. Undoubtedly, the question would be free from all doubt, if it was directed to some one,

65 or some of the views of the acts or powers of the cashier involved in this controversy, and it may be that the question as put may involve some powers and acts not particularly involved in this issue, but we are not so satisfied that any answer which the question calls for may not shed some light upon the particular inquiries which are involved, as to justify us in excluding the question. We are not the less inclined to do so, because we think we see that the remedy of cross-examiuation is very ample to bring the matter back to the views of the defendants. The counsel for the plaintiffs may, in their view, suppose that other matters are involved in the issue, that more matters are involved in it than is consistent with the views of the defendant, and we think both ought to ought to have an opportunity to present their evidence in the case, and upon the whole, we admit the question.")

Q. Is there or not, as regards the pecuniary transaction between banks, any usage as to what officer of the bank conducts those transactions?

A. The cashiers.

Q. There is such a usage?

A. Yes, sir.

Q. It is conducted by the cashiers?

A Yes, sir.

Q. Who, in those transactions, signs the documents that bind, according to said usage, that bind or pledge the credit of the banks?

A. The cashiers.

66 Q. Had you any other authority than that, or any authority from the president, or the president and directors, to take checks in these instances?

A. I had not, sir.

Q. You had none?

A. No, sir.

Q. You gave Mr. Smith 84 certificates, you say?

A. Yes, sir.

Q. You took in 80 certificates on the 26th and 27th. Where did the other 4 certificates come from? where were they placed? where were they kept, and who did they belong to?

A. They belonged to the bank?

Q. Under the old contracts that you have spoken of was there any balance of gold which they could claim?

A. Yes, sir.

Q. If you can recollect, will you tell me what became of the memorandum checks that you took; one of them or both of them, the $50,000 memorandum checks?

A. I don't know.

Q. You don't know what became of them?

A. I don't know.

Q. Were they preserved among the papers of the bank?

A. I have not seen them for a long while. I have no recollection of them after obtaining them; I don't know what use was made of them, or what became of them.

Q. You stated what the purpose of taking them was?

A. Yes, sir.

67 Q. Just re-state it.

A. It was but as a little memorandum for the teller to use in his cash.

Q. State substantially what you told Carter you wanted the memorandum for.

A. I said I would like to have him give me a check for $50,000. He said, "we have never done that." I said, "I want it for a little memorandum that the teller may have in his cash to show the difference between the amount of gold and the currency paid out for the gold."

Q. Will you explain what you meant by "interfering with the discounts?" You spoke, in regard to discussing with the president whether you had money enough on hand to carry out these transactions "without interfering with the discounts."

A. The law requires that a bank shall have on hand, at all times, in order to discount paper, 25 per cent. of certain liabilities. Those liabilities are deposits and circulation.

Q. That is to be in lawful money?

A. Yes, sir.

Q. Is there any premium account kept on your books?
A. No, sir.

On cross-examination the witness testified:

68 Q. Whether prior to these transactions money was loaned by the Merchants' Bank to Mellen, Ward & Co?
A. Yes, sir.

Mr. Bartlett for the plaintiffs:

We object to it, unless they call him as their own witness; we have opened no such a matter.

Clifford, J.: We overrule the objection. Proceed.

Q. What amount?

A. I am not able to say, but probably hundreds of thousands of dollars. I don't know how far you intend to go back.

Q. It is not material for my present purpose. Whether Mellen, Ward & Co. were indebted to the Merchants' Bank on account of one or more of those prior loans, when these gold transactions began?

A. Yes, sir.

Q. About what amount?

Mr. Bartlett: Your honor will strike it out, if it turns out there is no connection.

Clifford, J.: It is in upon the express condition that it shall be connected.

Q. About what amount did Mellen, Ward & Co. owe the Merchants' Bank at the the time when these gold transactions were begun?

A. In the absence of any memorandum, I should say about $60,000.

Q. In what form was that loan at the time when these par-
69 ticular gold transactions were begun? I refer to the first gold transactions which you have given evidence about. In what form was the loan at that time?

A. I am not able to say that the first loan transaction we had was before the transaction you refer to.

Q. Come down to the transaction now in question, that is, the 250,000, which was the first one. In what form was the loan at that time?

A. You mean in what form the old loan was?

Q. Yes, sir.

A. Checks: that is the form of the indebtedness.

Q. That is, the Merchants' Bank held memorandum checks of Mellen, Ward & Co. to the extent, as I understand you, of about $60,000 when this arrangement was made, which resulted in these gold certificates?

A. Yes, sir.

Mr. Curtis for the defendants: I wish to indicate to the court one purpose I had in view, that they may see the connection. At the proper time, we shall insist that one gross departure from the law in

this transaction between the Merchants' Bank and Mellen, Ward & Co., was that notwithstanding their efforts to give this transaction, or these transactions, a good name and call it a sale; that substantially and in legal effect, they were loans, and that if they were loans, they were illegal loans for the reason that they exceeded the amount allowed by the statute to be loaned to one concern, and that
70 every dollar we can add to this only aggravates that difficulty. If we can add $60,000, that is one view in which we shall rely upon these transactions as all belonging together. It may be required to make an essential element.

Clifford, J. : Your rights will be reserved, Mr. Bartlett. The cross-examination having been allowed upon the statement that it would be connected, we think it not worth while to interfere to make any ruling upon the subject.

Mr. Bartlett for the plaintiffs: When we come to develop each particular instance, and what they mean by being connected with the transactions on trial, I suppose your honor will stop there. The gentlemen stand here, and say they put this matter in with the view of connecting it with the transactions now under trial. They put two or three questions, and they develop the fact that there existed a loan to Mellen, Ward & Co. of $60,000 at the time of this gold transaction, and then they explain how it is connected. Will not your honor rule at this stage, that if they can make no other show of its connection—

Clifford, J.: Exactly what they rose to state.

Mr. Bartlett: They have not yet stated it.

Clifford, J. : Shall you connect it in no other way?

Mr. Curtis. I think we shall. We are going to try when the gentleman gets through with his objection.

71 Mr. Bartlett. I must take the gentleman at what he states. He says: "I will now proceed to show your honor how I propose to connect it."

Mr. Curtis: One of the ways.

Clifford: J. One of the ways.

Q. I wish to ask you whether, when application was made to you by Mellen, Ward & Company, upon the subject of this gold transaction, in certificates—I come down to that—the particular transaction when application was made to you by them, whether it was not stated to them by you, either in the original interview, or after you had seen the president, that they could have the arrangement carried into effect, but they must previously settle up these other loans?

A. No, sir.

Q. Was not that made a condition? In point of fact, did they not settle it up?

A. No, sir.

Q. In point of fact, did they not pay a part of that loan, and give you a check for the balance?

A. No, sir; they did not. You say previous to this loan?

Q. Yes, sir.

A. No, sir; they did not?
Q. Did they afterwards?
A. No, sir.
Q. On the 26th day of Feb., didn't they give you a check on account of that previous loan?
A. Yes, sir; they gave me a check to pay a loan.
72 Q. What loan?
A. Loan from the bank.
Q. Was it or not a part or the whole of this previous loan that they gave you the check for?
A. No, sir.
Q. What loan was it?
A. A loan; one of the loans we had in the bank.
Q. Some other loan?
A. One of the loans.
Q. Which one?
A. It was a loan, the balance of which was $17,500.
Q. What was the amount of the check they gave?
A. $20,500.
Q. What was that difference of $3,000 for?
A. It was a balance of a loan of the Merchants' Bank, made in Dec., in which, sir, I had an interest.
Q. Was that $3,000 on account of that interest?
A. It was.
Q. What was that interest?
A. It was, if you want me to go back—
Q. I want you to answer the question.
A. It was on some Copper Falls stock, sir.
Q. What is that? I don't know.
A. I believe it's pretty well known by this time. It was copper stock, sir.
Q. You had an interest in copper stock?
A. Yes, sir.
73 Q. Where was that copper deposited? Or where did it exist? Where was it deposited?
A. I had a certificate of it, sir
Q. On what account did you hold it?
A. It was a loan made by the Merchants' Bank, and that was security.
Q. The Merchants' Bank made a loan on copper stock and other securities with it?
A. Yes, sir.
Q. What other?
A. Excess of government bonds and Amoskeag Manufacturing Co's.
Q. What was this interest of yours in this collateral that the Merchants' Bank held?
A. Do you want me to state the whole transaction?
Q. I want you to answer the question.
A. 150 shares.

Q. That you owned ?

A. Yes, sir.

Q. How did you acquire that ownership ?

A. In the original loan of the bank I had the right to take 400 shares, 200 of which I had sold previously, in Dec., which gave me a profit of $1,000, which was paid to me somewhere from the first to middle of Feb.

Q. By whom ?

A. By Mellen, Ward & Co. I sold the stock at auction; and it so happened, without any information to them. I sold it, and they became the purchasers.

Q. They paid you $1,000.

74 A. Yes, sir. After the sale, I told Mr. Carter I had sold 200 shares of Copper Fall's stock, which I had the right to take out of 400. He said he was sorry I had not informed him as it had been bought for his account. Carter said, "if you will cancel the sale, I will make it satisfactory to you." I told him I wanted to realize my profit. I had the right to take the stock, and I wished to realize my profit. I asked him several times, if he would pay it, and he said he would. It got along into Feb. I told him it must be settled. I think I told him, sir, I think I used the president's name, that he insisted upon the matter being settled.

Q. The president insisted upon its being settled ?

A. I used the president's name so as to bring it to a close. He had promised me time and time again it should be closed. I told him it must be settled. He grumbled and said, "I did not suppose you were going to turn right round and sell it," and that I ought not to claim the 250 remaining shares. I said to him, "very well, I am not disposed to be hard, I will do just what is right, and what will satisfy you." Instead of selling the 200 shares, and taking $1,000 profit, which was just about the profit, I relinquished 250 shares, and there remained to me the right to take 150 shares of Copper Falls.

Q. You say somehow or other that got into $3,000, which went into this check. How did that come about ?

75 A. No allusion was made to the Copper Falls or any other stock, when the application was made to me for this loan.

Q. That is not the question.

A. I am going on to state. During the interval of the two lots, the 26th and 27th, after the gold came in on the 26th, Mr. Haven said to me, "Mr. Fuller, call in that loan and have it paid."

Q. That is, the loan on the copper stock ?

A. Yes, sir; and have it paid; not have it remain any longer. I saw Mr. Carter, and told him the president requested that loan paid. He wished to delay longer. I told him, "You know the president has requested from time to time that this loan should be paid, and you had better pay it; if you don't I don't know as he would consent to take any more gold." I said, "The debt is small; the stock is selling for about $70 a share; I will sell my 150 shares at the broker's board; it will reduce the debt about $10,000, leaving $7,500 only that you have to pay." Carter replied, "Well, I had a little

rather you would not do that. You have pushed me up to pay this loan sooner than I wanted to, and I think I had rather agree with you to take some amount to settle." Said I, "Very well; I am not disposed to be hard. What is satisfactory to you?" Well, he said he had not had as much accommodation out of the loan as he expected, and he thought if he paid me $3,000 I ought to be satisfied. He reminded me, saying, "I know that is less than you would sell it for in the market. I think that would be fair, as we have not had much accommodation from the loan." Said I, "Very well; you give me your check for $20,500."

76

Q. That is $7,500 for the loan and $3,000 for your own account?

A. $3,000 for my own benefit and use.

Q. What day was that given to you?

A. On the 27th. I think; I think it was on the 27th.

Q. Go back to the time you alluded to just now, when this original loan was made to Mellen, Ward & Co., on these copper stocks. What was the bargain made between Mellen, Ward & Co., or Carter and yourself, as to the interest you should have in these stocks?

A. That I should have the right to take 400 shares at the average cost price, which was about $46.

Q. And if there should be a rise you might come forward and claim that stock at that lower cost?

A. I agreed to take it at $46.

Q. You agreed to do it at what it had cost?

A. Yes, sir.

Q. Was it not at your option whether you would take that stock or not?

A. No, sir; I don't esteem it so.

Q. What was the contract?

77

A. The contract was I should purchase 400 shares of that stock at cost.

Q. And out of that arose these two sums of $1,000 and the $3,000 in the manner you have spoken of?

A. Yes, sir; precisely so, and no other.

Q. I suppose there is some account kept in your bank showing interest that is earned, isn't there?

A. Yes, sir.

Q. Where did the interest received by the bank in these gold transactions go on your books?

A. To the credit of special interest.

Q. What does that mean?

A. Special interest is an item of cash kept by the paying teller in his cash.

Q. What does it include?

A. Interest on demand loans and of any other transactions. Any profit on gold or bonds; anything of that kind.

[The paper, a copy of which hereto annexed, marked E, was shown the witness.]

Q. Look at that paper and tell me whose handwriting it is.

A. That is my handwriting, sir.

Q. What is this paper?

A. That was a paper intended to show Mellen, Ward & Co. the disposal of some collateral we had at the time of their failure.

Q. Rendered to them by you?

A. I presume it was.

78 Q. Have you any doubt about it?

A. No, I don't know as I have any doubt about it.

Q. I find in this paper, among other things—there are a good many items—some of them it is not important at this moment to allude to; but there is one I want to call your attention to. "Interest due on loans $1,885 50." That had nothing to do with these tranactions in gold?

A. Not at all, sir.

Q. Then comes "demand $411 42." That is interest or some other matter?

A. Allow me to look at it, if you please. Yes, sir.

Q. Next comes $118 57, Amoskeag. That is some other loan secured by Amoskeag stock?

A. Yes, sir.

Q. Then comes this item, "Loan $500,000; taxes and interest $125." What is that?

A. That is the interest on the gold, but it is not the statement. I desire to say—

Q. I have no doubt you desire to say. I want to know what this statement says which was rendered to Mellen, Ward & Co.

A. It says loan.

Q. It says "Loan $500,000, taxes and interest $125."

A. Yes, sir.

At this point the reporter, at the request of Mr. Curtis, read the following extract from the report of the examination of

79 Mr. Fuller, as follows:

"A. Some one of the firm—perhaps I shall get it into my head by and by—some one of the firm made an application.

"Q. (Mr. Curtis.) What did he say?

"A. To know if the bank would take gold and pay for it at such time as either party might wish, either the firm of Mellen, Ward & Co. or the Merchants' Bank, at $125 currency, they paying the bank for the trouble, etc., equal to the interest on the amount of currency loaned.")

Q. Whether that is what was agreed to, what was said by one of them to you and assented to by you, or said by you to them and assented to by them?

A. I don't understand that I made use of the term "loan." We didn't make a loan. If I said a "loan—"

Q. Whether that is the substance of what was said by one of them to you and assented to by you, or said by you to them and assented to by them?

A. I said to them we would advance the money on the same terms as the former contracts.

Q. I don't understand you.

A. For each $100 in gold the bank would pay $125 in currency.

Q. My question is, whether that which the reporter has read to you is the substance of what was said by one of them to you and assented to by you, or said by you to them and assented to by them?

80 A. If the word loan is in there, it is not correct.

Q. You take that back?

A. I take it back, if I used the word loan, beause there was no loan about it, and it was not so understood.

Q. You stated when you went to the Second National to get those certificates which you first obtained from there, you paid at the rate of $125 in currency for $100 in gold certificates?

A. $100 in gold, yes, sir.

Q. What was the market value of gold and gold certificates on that day?

A. That I am not able to state; but I think, some where approximating towards 140.

Q. About 140?

A. I think so, sir.

Q. How did you get those certificates from the Second National Bank at 125 when the market value of gold was 140; do you know?

A. I don't know any further than that I presume that Mellen, Ward & Co.—

Q. I don't want your presumption; I want what you know?

A. I don't know anything about it, any more than Carter said he had paid the difference between 125—I only know what Carter told me.

Q. How was it as to the next lot?

A. Precisely so; the same thing exactly.

Q. (By Clifford, J.) Was the value the same?

81 A. I presume about the same; there was not much variation from day to day.

Q. (By Mr. Curtis.) Were the same identical certificates which had been received into the bank through this arrangment with Carter delivered out when you took the certified checks, or were they different certificates?

A. I am not able to say, sir.

Q. It would seem from what you have already testified, that gold certificates were not known at your bank when this first transaction was had?

A. The president said he was not familiar with them; I was entirely.

Q. You mean to say you had received them?

A. Yes, sir.

Q. Had you such certificates in your bank at that time?

A. We had, sir; I have not positive information, but I have no doubt of it.

Q. You have no personal knowledge whether you had or not?

A. I have no personal knowledge.

Q You don't know whether those identical certificates which you received were delivered?

A. I have no personal knowledge that they were or were not.

Q. After these transactions, was your bank examined by
82 two persons under the authority or claiming to act under the authority of the comptroller?

A. Yes, sir.

Q. Who were they?

A. Mr. Ransom, the general examiner, and by special authority Mr. Turner, the president of the Randolph Bank.

Q. Were you examined under oath by these examiners?

A. I was, sir.

Q. Did you state to them at that time that this was not a loan?

A. Yes, sir; I so understood.

Q. My question is if you told them?

A. I don't know whether I did or not.

Q. Did you state to him at that time that these transactionss were not loans. I wish to know whether you can tell us whether you told them, at that time, that these were not loans?

A. I have no recollection of any question being put to me, and could not swear to any statement I made at that time.

Q. Can you tell at this time what account you gave to those examiners of the character of these transactions, in respect to their being loans or not being loans?

A. I do not, sir; I have no recollection of the language I used.

Q. Well, the substance?

A. I don't know whether I told him it was a loan or a purchase. I don't know whether I used the word "loan" or "purchase."
83 The fact that you want to know—

Q. I want to know this fact, what you told them?

A. I can't tell you, sir.

Q. Do you recollect of the president of the bank coming to you before he wrote a letter to the comptroller of the currency to get information concerning Mellen, Ward & Co. having given you their checks on two occasions?

A. I have no recollection of it, sir; it is very likely he might; he used to speak to me every day about the matters of the bank; but I have no recollection of it.

Q. You can't tell whether, if you told him, that Mellen, Ward & Co. did give you two checks, whether that was so or not; you don't recollect anything about it?

A. I do not; I might have told him, or I might not; but I can't remember.

(The paper, a copy of which is hereto annexed, marked "E" was put in by the defendants.)

Q. Where is that check for $20,500 which you before referred to, given for the balance of the loan $17,500 and $3,000 on the account that you mentioned?

A. I have got it in my pocket, sir.

Q. Produce it and let us see its date, if you please?

A. That is the check.

84 [Copy.]

Mellen, Ward & Mower, bankers, 20 Congres st.

$20,500. BOSTON, *Feb. 27th*, 1868.

Atlas National Bank of Boston:

Pay to the order of J. R. Fuller, cashier, twenty thousand five hundred dollars.

No. 18660. MELLEN, WARD & CO.

[2 cent stamp, cancelled.]

Q. Whether that check went to the clearing-house?

A. No, sir.

Q. It is drawn, I think, as you read it, on the Atlas National Bank, isn't it?

A. Yes, sir.

Q. Your bank is a regular member of the Clearing-House Association, isn't it?

A. Yes, sir.

Q. What is its designating number?

A. Thirteen, I think.

Q. Each bank has a designating number?

A. Yes, sir.

Q. And yours, you think, is thirteen.

A. Thirteen.

Q. You have spoken of a usage which you say exists, of banks when dealing with other banks to be represented by cashiers?

A. Yes, sir.

Q. Does your personal knowledge extend out of your own bank on that subject?

85 A. Yes, sir.

Q. How?

A. By my own actions.

Q. That is, you represent your own banks at other banks by borrowing and lending money, and other banks are represented at your bank by their cashiers?

A. Yes, sir; that is the general rule.

Q. Now, sir, name the class of transactions in which that representation takes place?

A. Such as borrowing.

Q. Not "such as." I don't want illustrations. I want the class of transactions within your personal knowledge?

A. I think the class of transactions—I don't understand you. What they give when they borrow money?

Q. No, sir; I mean the class of transactions in which the cashiers of other banks represent those banks at your bank, and in which you represent your bank at other banks.

A. They are various, sir; as opportunities may present themselves to require me—

Q. That is no answer. I don't know whether you understand me. One class of transactions would be borrowing money?

A. Yes, sir.

Q. Is that a class of transactions in which this representation by cashiers takes place at your bank, and by you at other banks?

A. Borrowing money, yes, sir.

Q. When money is thus borrowed by cashiers of other banks
86 at your bank, what do they give?

A. They usually give a check on their own bank, or a check on the bank they borrow the money of. If I borrow money I usually—

Q. I am not speaking of what you do, but I am speaking of this usage. When banks borrow money of your bank what do they leave in exchange for the money?

A. Checks.

Q. What kind of checks?

A. Usually bank checks.

Q. What do you mean by bank checks?

A. I mean a great many banks have a particular form of check which they call their own, and in many instances they will use a common check.

Q. That gives us no accurate idea what it is. Is it a draft on your bank or is it a draft on the debtor bank, and by whom signed?

A. Signed by the cashier. The form of the draft is of no importance; when cashier deals with cashier, he takes—

Q. The importance of forms is matter of judgment. I don't want you to enter any such discussion. I want to know what a cashier gives when he comes to your bank and borrows money.

A. As a general thing they give a check drawn on their own bank or on the Merchants' National Bank. Some prefer doing it one way and some another.

Q. Sometimes it is a cashier's check on the borrowing bank;
87 sometimes it is a draft by the cashier on the lending bank?

A. A check signed by the cashier, whether you call it a cashier's check or not, I don't know.

Q. It is signed by the cashier?

A. Yes, sir.

Q. And it is either a check on the borrowing bank of which he is cashier, or it is a check, on the lending bank which lets him have the money?

A. Yes, sir.

Q. That is the general rule, is it?

A. That is the general rule, sir.

Q. Now, sir, name any other class of transactions of which you have personal knowledge, and are ready to swear there is a usage? I want you, if you can, to name any other class of transactions so numerous as to amount to a usage in which the representation takes place within your personal knowledge?

A. I have known cashiers to come in—

Q. No matter what you have known, that is not the question; we are upon the question of usage. There may be a great many good things done, and a great many bad things done; but the question is about usage.

A. The calls of cashiers are various, and it depends upon circumstances. I can give you no more definite answer than that.

Q. Where the practice is various and depends upon cir-
88 cumstances, I suppose there is no usage. Is that as far as you can go upon this subject?

A. Yes, sir.

Q. We will leave that there, then. Have you ever known the State Bank to be represented by its cashier at your bank in borrowing money?

A. Not until—

Q. No; before these transactions, and after your bank was organized as a National Bank?

A. I can't swear positively; very likely; but I can't say.

Q. Then it is not either likely or unlikely, if you can't say; if you remember any instance, say so.

A. I don't remember, sir.

Q. If you remember any instance in which the State Bank has borrowed money at your bank through its cashier, you will say so.

A. I don't, but I can refer to the books.

Q. No matter, if you don't remember any, what else there is. In these cases of borrowing money at your bank by cashiers in the manner you have mentioned, have you personal knowledge whether, in each instance, the cashier has or has not been authorized by the president or board of directors to do it?

A. No, sir; not in any instance.

Q. You have no knowledge upon the subject?

A. No knowledge at all.

89 Q. You don't know whether, whenever they have come to borrow, they have been authorized to borrow or not?

A. I do not, sir.

Q. Did you pay anything to Mellen, Ward & Co. for these shares of copper stock which you spoke of, which resulted in that profit of $4,000?

A. No, sir; nothing more than was in the loan.

Re-direct.

Q. What is the usage, if usage exists, in regard to cashiers' drawing checks, purchasing gold or purchasing exchange?

A. I supposed that was understood; there is a usage for cashier's doing all these things, buying exchange, selling exchange, drawing New York checks and buying New York checks.

Q. How about gold, also?

A. Also gold, buying and selling gold.

Q. That is, the usage is to make contracts and give checks for them?

A. Yes, sir.

Q. I suppose you never inquired of any cashier of another bank who borrowed money at your bank, whether he was or was not authorized?

A. Never, sir.

Q. Did you ever have any authority from the president to use his name, as you mentioned just now in talking with Mr. Carter?

90 A. No, sir.

Q. Did the president know that you sent word to Mellen, Ward & Co. that perhaps he would not make the loan unless they settled that up?

A. No, sir; it was something that occurred to me to use Mr. Haven's name to bring the thing to a settlement.

Q. You had no authority to use his name?

A. No, sir; no authority.

Re-cross.

Q. You understand you are to speak from personal knowledge on this subject of usage?

A. Yes, sir.

Q. Why didn't you mention these other instances when I asked you?

A. It did not occur to me, sir; they are so common. I didn't see exactly the whole bearing of your question.

Q. The usage is so frequent it didn't occur to you?

A. I thought it was so simple everybody understood it, and you would be likely to know.

Q. That was the reason, was it?

A. Yes, sir.

Q. Won't you tell us in how many instances you have known cashiers to deal in gold on account of their banks by buying it?

91 A. I have no knowledge of any other cashier doing anything in regard to buying and selling gold.

Q. No knowledge of any cashier's doing it other than who?

A. Than myself.

Q. You have bought and sold gold?

A. Yes, sir.

Q. And that is all the knowledge you have on this subject?

A. That is all, sir.

Q. Well, sir, how is it about buying and selling exchange on New York?

A. It is common with all cashiers. I buy it of cashiers and sell it to cashiers.

Q. When you have bought and sold gold for your bank, has it been under the authority of the president that you acted?

A. Usually, sir; always, I may say.

Q. It was not an authority which you exercised by virtue of your office as cashier, then?

A. No, sir.

Q. But it was a special authority given to you by the president on each occasion?

A. Yes, sir; when I sold or bought gold for the bank specially.

Q. Well, how is it as to exchange? Suppose the state of your bank

is such, that you suppose personally, as cashier, that you want exchange on New York, want funds in New York, or that there
92 is occasion to have more funds there than you have, do you report that to the president?

A. No, sir; I may mention it to him, and I may not; sometimes I do and sometimes I do not.

Q. Then there is no uniform usage on the subject?

A. No, sir; it is left to my judgment.

Q. Do you buy large amounts—hundreds of thousands of dollars—without consulting the president?

A. Yes, sir.

Q. In one transaction?

A. Yes, sir; I have bought sometimes three, four or five hundred thousand dollars without saying anything to him.

Q. You say the usage is not uniformly one way, but sometimes you tell him and sometimes you do not. Why do you ever say anything to him?

A. Such large transactions I very naturally would say to the president "I have been buying New York funds."

Q. Not been buying them but before you bought them, wasn't it?

A. I might say to the president "I am going to buy one, two or three hundred thousand dollars." If he happened to be by my side when I was going out I should mention it; if not, I should go and buy it, if I wanted it.

Q. When you buy exchange in this way how do you pay for it?

A. I usually pay in currency or greenbacks; sometimes give a check on the bank, according to circumstances.

Q. A check is a very indefinite term. What check?

93 A. I go into the bank and if I see a check on the Merchants' National Bank I use that; if it is a printed check on the State Bank I cross out the State Bank and put on "Merchants' National Bank pay C. H. Smith, or order, fifty thousand dollars," and sign it J. K. Fuller.

Q. That is what you give; a check on your own bank signed by you as cashier?

A. Yes, sir.

E. C. Millett, the book-keeper of the State National Bank, produced the books of that bank and testified: That the account of C. H. Smith, the cashier, in the general ledger, showed the number, amount and dates of checks given by him in lieu of bills, discounts and for exchange, but not for the balance at the clearing house; that the aggregate amount of the checks drawn by him during the five months preceding February 23rd, 1867, was $2,500,000, viz: in October, $546,704 23; November, $361,296 58; December, $835,571 03; January, $489,235 20; February, $321,313 89—171 checks in all; that besides these he had drawn checks for money borrowed of other banks during the last six months preceding February 23rd, 1867, to the amount of $1,547,000, and about thirty checks; the largest amount of any one check was $100,000.

On cross-examination he stated that the checks given for

94 money borrowed of other banks were drawn on the bank of which the money was borrowed, that the checks were sometimes on blanks contained in a book and sometimes on a common blank; the custom was not uniform, that when the checks were given to customers in lieu of bills, sometimes a common State Bank check was used, and during the latter part of the time a regular printed blank; these were in the usual form of a check and signed by C. H. Smith, as cashier, and usually made payable to the person, or order, to whom it was to be given, or to bearer.

Question. I want to ask you a question in regard to the practice of which you spoke of giving these cashiers' checks in lieu of bills; when did that practice cease, if at all?

Answer. In February the last check was given.

Q. What is the date of the last check on that book?

Q. I can tell you the last charge I made of that kind. February 28th I made the last charge.

Q. That check you charged at the time when it came into possession?

A. Yes, sir.

Q. And that was after it was paid by the bank and belonged to the bank?

A. Yes, sir.

Q. Then the check which you charged on the 28th would be dated naturally sooner?

A. Probably the day before.

Q. The practice ceased at that time?

95 A. Yes, sir.

John W. Soren testified as follows:

Question. You are at present cashier of the Boylston National Bank?

A. Yes, sir.

Q. And have been so ever since it became a National Bank?

A. Yes, sir; about 20 years.

Q. You are familiar, are you not, with the usages of the banks in Boston?

A. I presume I am, sir.

Q. Are there, or not, transactions which take place between the various banks of Boston, one bank with another?

A. There are.

Q. What are these transactions?

A. Most generally that of borrowing or loaning money, and selling New York funds, with us.

Q. And buying, I suppose, as well?

A. Occasionally, not often, we being up town.

Q. Is there any usage or custom between the banks in Boston as to the officer or officers of the bank by whom these transactions are conducted—the borrowing and lending of money between banks?

A. It is always done with us by the cashier.

Q. I did not ask you how it is always done with you, but as to how it is done by the banks of Boston?

96 A. Whenever I have borrowed money I have done it as cashier without any authority from any one.

Q. When you have borrowed money you say you have done it as cashier. You have borrowed more or less of different banks, have you not?

A. Yes, sir; of a great many.

Q. Your knowledge, then, is derived from your knowledge and experience as a borrower?

A. Yes, sir.

Q. Do you lend money in the same way?

A. We should lend it if called upon, but being an up-town bank we are not apt to be called upon.

Q. With whom are your transactions carried on as to borrowing money; with what officers of the other banks?

A. In almost all cases with the cashier; sometimes with the president if he happens to be in, but generally with the cashier.

Q. What obligation and voucher do you give for this borrowed money?

A. I give my own, signed as cashier.

Q. Upon what bank drawn?

A. On various banks; whatever bank happens to have money.

Q. That is, on the bank from which you borrow?

A. Yes, sir; any bank that happens to have a balance over will loan us.

Q. How are these obligations paid?

A. They are generally drawn upon us through the clearing-house, or notice given that they want their money. We pay them
97 either in greenbacks or by a check on New York, just as it may happen, or as the parties want it.

Q. You say you are familiar with the custom of banks in buying New York exchange of each other. What officer do you deal with?

A. If I should buy New York exchanges it would be with the cashier; I don't buy much, for I don't have occasion to; I generally sell.

Q. In selling New York exchange, what officer of the other banks do you come in contact with?

A. Generally the cashier; in most cases.

Q. When you sell New York exchanges how do you get your pay; what is the usage in that respect?

A. We generally get a check and it is paid through the clearing-house.

Q. A check; signed by whom?

A. By the cashier.

Q. A cashier's check payable through the clearing-house?

A. Usually; in almost all cases.

Q. Besides this borrowing and lending money, and buying New York exchanges, are there any other transactions which are frequent between banks?

A. There are not many besides with us.

Q. In this borrowing and lending of money, and buying and selling

New York exchanges, do you act by authority of your directors or president, or without authority?

98 A. Without authority.

Q. Have you ever inquired of the other cashiers whith whom you deal in this way, whether or not they have authority?

A. I have not.

No cross-examination.

George B. Hersey testified as follows:

Q. You are cashier of the Howard National Bank?

A. Yes, sir.

Q. How long have you been cashier of that bank?

A. Ever since it was a National bank, and for some time previous.

Q. You were cashier of the Howard Bank when it was a State bank?

A. Yes, sir.

Q. Do you know whether there are transactions of the National banks of this city with each other?

A. There have been with us.

Q. What is the nature of these transactions; what are they?

A. Borrowing and lending.

Q. Any other transactions?

A. Selling New York and buying.

Q. Any other transactions that you recall?

A. Not with me.

Q. Do you know whether there is any usage or custom among
99 the Boston banks as to the officers of the banks by whom these transactions are carried on?

A. Usually carried on with the cashier, have been.

Q. How frequent are the transactions of borrowing and lending?

A. Well, they are quite frequent with us.

Q. Well, how frequent?

A. Oh, half a dozen times a week, perhaps, or three times a week; sometimes more, or less.

Q. And about what amounts?

A. Various amounts, from $20,000 to $50,000.

Q. At one time?

A. Yes, sir.

Q. In these transactions how are the amounts borrowed; what obligation or voucher is given for them, according to custom here?

A. I give a check, usually a cashier's check, on the bank I borrow of.

Q. And how are these checks paid?

A. With greenbacks, or an order on the clearing house; sometimes by a check on the bank.

Q. Do you make these transactions, borrowing and lending money, buying and selling New York funds, with or without any special authority from your president or directors?

A. Without.

Q. Do you ever inquire of the cashier, with whom you deal in this way, whether or not they have any special authority?

No, sir.

No cross-examination.

100 Charles C. Hall testified as follows:

Q. You are the cashier of the Boston National Bank?

A. Yes, sir.

Q. And you were formerly cashier of the National Bank of Boston?

A. Yes, sir.

Q. The Boston National Bank is the same bank?

A. Yes, sir; reconstructed.

Q. You know as to the transactions which the banks of Boston have with each other, do you not?

A. I know some of them.

Q. What are the usual transactions between the banks here in Boston?

A. The usual transactions between the cashiers of the banks here are the settlement of the daily balances. If any banks are short they find some bank that is over and borrow, and pay their balance at the clearing-house. Another duty devolving on cashiers is the regulating of New York exchange, New York balances, one bank wanting to sell and another desiring to buy. These transactions are made, so far as my knowledge extends, by the cashiers.

Q. What is the custom as to the officer transacting this business?

A. By cashiers.

Q. Is it customary, or not, in making these transactions, to get special authority from the directors?

A. Not to my knowledge.

Cross-examination.

101 Q. In your own bank, does the president take any active part in the management of the bank?

A. Very little, sir.

Q. I do not ask it as a matter of curiosity merely, but what salary is he paid?

A. Two thousand dollars.

Q. Is there, or not, a difference, within your knowledge, in the manner and modes of conducting the business of banks in this city, and in this particular; that in some of the banks the cashier is the managing officer who does not consult the president, but refers to the directors if he has occasion to, and other banks where the president gives his whole time to the business of the bank, and is the managing officer; is there not that difference in banks?

A. Yes, sir.

Q. In your bank the cashier is the managing officer?

A. He is, by the by-laws.

Q. Do you know how it is in the State Bank?

A. I do not.

Q. What do you receive in payment of loans, when you make loans?

A. When we loan a bank on the street we ask them for their check on us, on which we charge them as bank balance.

Q. And you send that check through the clearing-house?

A. No, sir; we cancel it and keep it on our files.

Q. How are you reimbursed?

102 A. When we want our pay we notify them and draw a check on them.

Q. Does that go to the clearing-house, or is it sent directly to the bank?

A. Sent directly to the bank, unless the bank itself requires a different course.

Q. That is the usual course?

A. Yes, sir.

Q. Do you ever receive at your bank, in payment of such loans, checks on third persons, certified by the cashier?

A. We do not.

A. G. Loud, cashier of the Second National Bank of Boston, testifies: That prior to the 23rd day of February, 1867, his bank had loaned to the State Bank $360,000, at different times, in sums varying from $10,000 to $130,000 at one time; that in all these instances the application was made by the cashier; the whole transaction was with the cashier, who gave him his checks, as cashier, for these loans.

Q. Is there, or not, any usage on the street in regard to the transactions of bank with bank in borrowing moneys?

A. Yes, sir; there is a usage.

Q. And lending money?

A. There is.

Q. Who is that conducted by?

103 A. The cashier, sir.

Q. On both sides?

A. On both sides.

Q. Are large amounts involved in such transactions, Mr. Loud?

A. Yes, sir.

Q. How large; take your own, for instance?

A. Extending to hundreds of thousands of dollars.

Q. Take the largest in any one instance, from '64 down to '65,-'6-'7?

A. I think in May, 1864.

Q. Give the largest amount when your institution borrowed or lent; you need not name the institution; what is the largest amount?

A. $500,000 to the Suffolk Bank.

Q. That transaction was between the cashiers, sir?

A. Yes, sir; that amount commenced on June 19, 1864, with $210,000; on the 23d it became $310,000; on the 25th of the month $500,000, and continued so until July 1st. Another transaction was with the Webster Bank of the same year.

Q. What is the usage, so far as you know, about the transactions being communicated at all, or originating with the presidents of the banks?

A. I think they do not originate with the president.

Q. In your own case?

A. In my own case, after the transaction, if the president is at hand, I always report to him.

104 On cross-examination the witness testified:

Q. Mr. Loud, if you have occasion to borrow money in behalf of your bank—you are the cashier, I understand—you go round and see where you can borrow it, do you?

A. I should go round.

Q. I am asking you what you do, not what you should do. What you have done, what your practice has been, when you have had occasion to borrow money? Do you go round, or have you gone round to the different banks and ascertain where you could get it?

A. No, sir; I have gone in every instance we have had occasion to borrow, directly to the party prepared to lend it.

Q. How do you know?

A. Because I obtain a report from the clearing-house of the banks who are creditors there, and so I have not been obl ged to make a circuit.

Q. I understand you get, through the report of the clearing-house, which are creditor banks?

A. Yes, sir.

Q. Do you select some one of those and make your application?

A. Yes, sir.

Q. That you do in person?

A. In person.

Q. When you return to your own bank, what do you do
105 there to carry out this transaction? Suppose they assent to make you a loan, what do you do on your return to your own bank to carry out this transaction?

A. Give my check for the funds borrowed.

Q. What kind of a check? On whom is it drawn?

A. The check would be drawn on my own bank.

Q. How is that check entered on your books, if at all?

A. It is charged when the debt is paid.

Q. Is it not entered in any way on your books at the time it is issued from the bank?

A. No. sir; because the funds received are credited to the bank of whom we borrow; the check remaining out will be charged against that account when it comes in.

Q. The amount you receive goes into your books to the credit of that bank to whom you have given the check?

A. Yes, sir.

Q. That is done, I suppose, by the teller—these entries?

A. By the book-keeper, sir. It is first entered by the teller of the bank.

Q. Then goes to the book-keeper and he credits it to the bank. And when the check is paid and comes back, what is then done?

A. It is then charged against that credit.

Q. By the teller?

A. By the bookkeeper.

106 Q. Don't the paying teller enter it?

A. The paying teller records his list of checks?

Q. He records the check and then the book-keeper charges the check against the loan?

A. Yes, sir.

Q. Your bank, I suppose, is a member of the Clearing-House Association?

A. Yes, sir.

Q. Is not each bank represented in the meetings of the Clearing House Association by some one of its officers?

A. It may be, sir.

Q. I don't mean that any officer attends every meeting, but I speak of the rule.

A. Yes, sir.

Q. By the president, or cashier, or whoever the bank chooses?

A. Yes, sir.

Q. How is it at your bank?

A. Usually the president; sometimes by the cashier.

Q. Were you present at a meeting of the Clearing-House Association, representing your bank, at which action was taken on the subject of certifying checks by cashiers?

A. I was not.

Q. You did not represent your bank at any such meeting?

A. No, sir, not to my knowledge.

107 Q. As the result of any such meeting, did your bank receive a circular from the Clearing-House Association?

(Question objected to by plaintiff; admitted; saved.)

Q. I understand you to say that you did not personally represent your bank at a meeting of the Clearing-House Association, when the subject of certifying checks was acted upon?

A. That is it, sir.

Q. As a consequence or result of the action at the clearing house on that subject, did your bank receive a circular?

A. I presume so; I received a circular.

Q. Have you got that, or a copy of it?

A. I can't say. Undoubtedly there is one at the bank, if received.

Q. Have you any objection to letting us have it?

A. I am not aware that there is one in my own possession.

Q. What do you mean by "in your own possession?"

Mr. Bartlett, of counsel for the plaintiffs. Your honor understands us as continuing the objection down to the line of interrogatory.

Mr. Curtis, for the defendants. If you have any additional objection it should be specified.

Mr. Bartlett. It is not in addition; it falls within the same rule, that you cannot interrogate this witness in regard to matters between the clearing-house and his bank.

108 Clifford, J. The court has not ruled that any circular can be intro duced in this stage. When it reaches that, you can be heard, Mr. Bartlett.

Q. I understand you to say that your bank did receive a circular, and you presume it to have come from the clearing house?

A. Yes, sir.

Q. Where is that circular?

A. It would be impossible for me to say, sir? Shall I answer you a little further? I have procured three sets of circulars from the clearing-house since this transaction.

A. I don't want what you procured; I am speaking of a circular sent to you, in the regular course, before this transaction. Did you receive such a circular.

A. Yes, sir.

Q. Do you know where it is now?

A. I do not know.

Q. Do you know whether it is in existence?

A. I can't say that.

Q. You don't know whether it is or is not?

A. No, sir.

Q. Have you any objection to make a search and see?

A. Not the slightest?

Q. And will you let us have it in the course of this trial?

A. Yes, sir.

109 Mr. Curtis. I wish you would look not merely for one, but for two circulars; one about the 21st of November, 1866, and the other about the 5th of December, 1866. If you will please look for them, Mr. Loud, and if you can find them, let us have them, and if you can't find them, report that fact.

A. I will do it, sir.

Q. You are the recording officer of your bank, and attend its meetings—the meetings of its board of directors?

A. Yes, sir.

Q. Did your board of directors take action upon this subject?

A. Yes, sir.

Q. What was their action?

Mr. Abbott, for the plaintiffs. This goes in under our objection.

Clifford. J. The decision of the court is that the evidence may be received, and the question propounded.

Q. You stated that your bank took action on this subject. Were you present at the meeting?

A. I can't say on that point. I made the record, or subscribed it. I may answer by saying that my duties are such that I am not always present at meetings of the board, although recording them.

Q. And you make the record on the information which is given to you by those who were present, and under the direction of the president or some presiding officer?

110 A. Yes, sir.

Q. The bank has that record now, I suppose?

A. Yes, sir.

Q. Will you let us have that to use on this trial?

A. Unquestionably, if the court so orders; but we don't like to part with our books.

Q. In your testimony which has been given upon the subject of usage and borrowing money, were you speaking of your own practice as a cashier?

A. Both of my own practice and of the custom, so far as it has come to my knowledge.

Q. When I say your own practice, I mean your practice of borrowing and your practice of lending; you speak of both?

A. Yes, sir.

Q. Outside of that, what personal knowledge have you?

A. Every morning from one to five cashiers are at my desk and have some transactions on the part of their respective banks.

Q. That don't answer my question. I understand you to say that you speak of your own practice to borrow and your own practice to lend. Outside of your own practice to borrow and your own practice to lend, outside of that, what personal knowledge have you of the usage?

A. The presence of other cashiers to do the same thing, to borrow and to lend.

Q. To you?

A. Yes, sir, to us.

Q. That is included in the first statement.

111 A. It don't seem to me so.

Q. I mean to include it. When I speak of your practise to borrow or lend, I mean to include all you do personally.

A. My practise would be what I do; my knowledge of the practise of others would be what I see them do.

Q. Do you see them do anything out of your bank?

A. They come into my bank to borrow money; therefore I say it is the practise of the cashiers of those banks to borrow money. Perhaps I don't get your idea.

Q. I don't think you do. I want to know whether you have personal knowledge of borrowing or lending by cashiers out of your bank?

Direct re-examination.

By Mr. Bartlett, (for the pl'ff:)

Q. Do you speak of your personal knowledge of the transactions? Don't you know from common report?

Mr. Curtis, (for the def't.) I object, because it is a leading question, and because I don't conceive it to be competent evidence.

Q. How many of the cashiers of the banks in Boston have you dealt with in that way, borrowing and lending?

A. Probably three-fourths.

Q. Do you know or not, aside from your personal transactions with three-fourths of the banks of this city, whether or not it is

112 understood among all the cashiers that the power of borrowing money, or the usage of borrowing money, from cashier to cashier, prevails throughout the city?

Mr. Thomas. That can't be put.

Mr. Curtis. The question was, what is understood?

Mr. Bartlett. Known—is it known? I will put it in that way. Is it known to him, from his personal knowledge? For how, your honors, is the usage to be established? It must be established by repute. Your honors will not permit me to ask the way he does the thing. Usage must be shown by repute; therefore I ask him, according to the common understanding and reputation, is there any usage of that sort?

Clifford, J. It is not possible to admit it, Mr. Bartlett. We will save the question. It is a new feature of the law of evidence that usage can be proved by repute—new to the court, at least; it may not be new to counsel. We are obliged to exclude it.

Mr. Bartlett. I propose to show that in the course of business he has obtained knowledge, or understanding, or information from others, that that is the usage.

Clifford, J. If confined to knowledge we admit it.

Mr. Barlett. I put it upon information.

Clifford, J. The question is, from knowledge or information.

Mr. Bartlett. The question is, whether from information derived in the course of business he is aware that there is any custom
113 in that respect? I do not want to waste much time upon it, because it is not of enough importance.

Clifford, J. In putting your question, from knowledge or from information in the course of business, do you mean by the latter phrase to call for any statement from the witness not founded upon knowledge of the usage?

Mr. Bartlett. Upon information obtained in the course of his own business. "Knowledge," may it please your honors, is used in a narrow sense, so far as usage is concerned. But I must ask your honer to waste no more time upon it; and I put this question, whether he knows from information, aside from the transaction of business at his own bank.

Clifford, J. The court excludes the question, understanding that it calls for statements from the witness not founded upon personal knowledge of the usage.

Mr. Bartlett. That is the very question, may it please you honor.

Clifford, J. On personal knowledge of the transaction.

Mr. Bartlett. Of the transactions. Now, your honor, give me the ruling.

Clifford, J. Change the word "usage" to "transactions," because I mean to speak definitely.

Mr. Bartlett. Whether or not, besides his knowledge of the transactions at his own bank in the course of business, he knows of
114 the existence of a usage from information, which your honor excludes.

Clifford, J. Information derived from others?

Mr. Bartlet. Yes, sir.

Clifford, J. Excluded.

Mr. Bartlett. From information or intercourse with other cashiers.

Mr. Curtis. I really think the question ought to be put in some form.

Mr. Bartlett. May it please your honors, I will put it in as many forms as I can, to get the ruling.

Clifford, J. The only ruling the court makes upon the subject is this: that a witness, giving testimony as to usage, must have personal knowledge of the statements which he makes. That will cover the whole ground.

Q. I will put the last question. Whether or not, besides your knowledge of the transactions at your own bank, you knew, in the course of business, the existence of a usage from information?

Clifford, J. Excluded, with the understanding on the part of the court, that the word "information" implies that he has learned from others.

Mr. Bartlett. In the course of business?

Clifford, J., (continuing.) And not within his own personal knowledge.

(Objected to by pl'ff; saved.)

115 Chas. J. Sprague testified as follows:

Q. You are cashier of the Globe National Bank?

A. Yes, sir.

Q. How long have you been an officer of that institution?

A. Of the Globe National Bank four years—from the time it was changed.

Q. Whether or not, from your own knowledge ascertained in the course of business, you know that there does or does not exist a usage among banks in regard to transactions with each other in reference to borrowing money?

A. Such a practice does exist.

Q. Is it uniform, sir, as far as you know?

A. The transactions are similar.

Q. Who makes these transactions?

A. The cashier.

Q. To a large extent or small?

A. Both, sir; varying sums; from trifling ones to large ones.

Q. Have you ever had occasion, as cashier, to have any dealings with the cashier of the State Bank previous to the 28th of February, 1867?

A. Yes, sir.

Q. What were those transactions, and how numerous?

A. Sending him money.

Q. What voucher was given for the money, sir?

A. His check on his own bank.

Q. How were the checks paid, sir?

A. By charging them in the clearing-house the following morning, or later, as it might be.

116 Q. Was there any other transaction covered by that usage of cashier dealing with cashier, except borrowing money and lending money?

A. Buying and selling New York funds.

Q. I understand you to say that the transactions were with the cashier?

A. As a general thing. But these things are variable in the manifold transactions between bank and bank.

Q. In these transactions do you inquire for the authority of the cashier before you make them?

A. No, sir.

Q. Is the transaction of buying and selling New York funds a pretty large business?

A. Yes, sir.

On cross-examination the witness testified:

Q. Mr. Sprague, do you speak now of transactions in borrowing and lending by your own bank?

A. Yes, sir.

Q. When the cashier of the State Bank borrowed money of the Globe Bank, I understand you to say that he gave a check on his own bank, which went into the clearing-house the next day?

A. It is charged the next day, or the day after, as circumstances may determine; but whenever settled, it is charged in the clearing-ing house and passed through.

Q. To what circumstance do you refer which might prevent the check from going into the clearing-house the next day?

117 A. We might prefer to hold it over the next day, feeling we might want the money more the following day than we do the next day.

Q. You may have done so; but is there any usage in regard to it?

A. Yes, sir; there is a usage in my bank to do so if they choose.

Q. The question is, whether they choose to hold them over so generally as to make a usage.

A. I only tell you what the usage of the Globe Bank is.

Q. Do you mean to say that they usually or frequently hold over the checks, and do not send them to the clearing-house the next day?

A. I say the Globe Bank holds them over when it chooses, one day, or two days, when circumstances require it.

Q. Is there any general practice of the Globe Bank to hold over the checks—a general practice?

A. It is the general practice to hold over bank cashiers' checks.

Q. I mean these checks; that is all we are speaking of.

A. Yes, sir.

Q. They usually hold them over, and do not send them into the clearing-house the next day?

A. No, sir, not usually; but occasionally.

Q. Rare occasions, or very frequent, or quite frequent?

A. Well, neither rare nor frequent, sir; sometimes, if I may be allowed to expand a little my evidence.

Q. Who, if any person, represents your bank at the meeting of the Clearing-House Association?

118 A. The president of the bank.

Q. Have you any personal knowledge of the clearing-house having taken action upon the subject of the certification of checks by cashiers or other officers?

A. None other than hearsay.

Q. In consequence of action by the clearing-house on this subject did you receive any circular, or did your bank receive any circular in regard to it?

A. I think it did, sir.

Q. Where is that circular now?

A. In my waste basket, if anywhere existent.

Q. In your waste basket?

A. Yes, sir; I generally throw them there when I receive them.

Q. Do you think you can find it or not?

A. No, sir.

Q. I want to ask Mr. Sprague the same question that I asked Mr. Loud. You are the recording officer of the bank, I suppose.

A. Yes, sir.

Q. Have your board of directors taken action on the subject of certifying checks?

A. Yes, sir.

Q. That is recorded, I suppose?

A. It is.

Q. Will you furnish us with a transcript of the record showing what that action was?

A. I have no objection, sir.

Q. Was the vote that was thus passed, or a copy of it, sent

119 to the clearing-house?

A. I can't say, sir.

Q. Was not that the purpose of passing it?

A. No, sir.

Re-direct.

Q. (By Mr. Bartlett.) Mr. Sprague, you were asked about holding over checks. Does it or not depend upon the wish of the cashier borrowing whether you send it the next day to the clearing-house, or hold it over?

A. Not always. Shall I state the custom? I will state the usage of the Globe Bank. It is a very common thing for a cashier who desires to borrow money for his bank to apply to us, and if we are largely in funds we lend him the money, and let it be understood that we shall not call for it, perhaps, for some days. On the other hand, we are, perhaps, short, and yet, wishing to accommodate that cashier, or that bank, we say, "We will lend it to you, but we may have to charge it to-morrow morning or the day after, or two days after," depending upon the necessities of the bank; but we always feel ourselves at liberty to charge it in, and consider it cash in our hands.

Q. The sending it in promptly to the clearing-house, or afterwards, is matter of arrangement between the cashiers at the time the loan is ready?

A. Frequently.

120 S. S. Blanchard testified:

Q. Of what bank are you cashier?

A. The Hamilton National.

Q. How long have you been so, sir?

A. Since its organization as a national bank.

Q. Do or not the banks of this city have dealings with each other in borrowing money, and buying and selling New York funds?

A. They have such dealings extensively and constantly.

Q. Do you or not know of your own knowledge, or from information derived in the course of your business, whether or not there is a usage as to what officers of banks conduct the negotiations you have spoken of?

(Objected to; excluded; saved.)

Q. Is there or not known to you any usage as to what officers conduct these negotiations?

A. The cashiers.

Q. Is there usage for cashiers to conduct them?

A. Yes, sir; I understand it so.

Q. Involving large or small amounts?

A. Large amounts.

Q. What vouchers are given and taken, and who are they signed by?

A. If I borrow money of a bank I generally draw on that bank, by what is called a cashier's check.

Q. With regard to the purchase and sale of exchanges, what sort of voucher is given?

A. Sometimes, if we are flush of greenbacks, we may pay
121 in greenbacks, or give a cashier's check.

Q. In dealing with cashiers, sir, is any inquiry made with regard to their authority in these various transactions?

A. I recollect no such instance, sir.

On cross-examination the witness testified:

Q. Who has represented, at the meetings of the Clearing-House Association, the bank of which you are cashier?

A. Our president, sir. He happens to be chairman of the Clearing-House Association.

Q. You have no personal knowledge, I suppose, of the action of the clearing-house upon this subject of certifying checks?

A. Yes, sir. I know that we received a circular from the clearing-house.

Q. You have no personal knowledge of the action of the clearing-house?

A. No, sir; I have no personal knowledge.

Q. You were not there?
A. No, sir, I was not there.
Q. I will ask you whether your bank took action on the subject.
A. Yes, sir; they did.
Q. Will you have the kindness to furnish us with a transcript of that vote?
A. Yes, sir.
Q. You are the recording officer, sir?
A. Yes sir.

122 Lemuel Gullivan testified:

Q. You are cashier of what bank?
A. The National Union Bank.
Q. Been so since its organization, I suppose, sir?
A. Yes, sir.
Do the banks of this city borrow of and lend money to each other, and buy of and sell exchange to each other?
A. Yes, sir.
Q. Large or small amounts?
A. Yes, sir; large or small, according to their wants or means.
Q. Is there or not a usage know to you as to what officers of the banks conduct these transactions?
A. Yes, sir; I should say so.
Q. Who do conduct these transactions?
A. The cashiers of the different banks.
Q. What vouchers do they give or receive in these negotiations?
A. If a cashier wants to borrow of me and I agree to lend him $50,000, he sends in his check drawn on us for that amount.
Q. Suppose you borrow of another cashier on behalf of your bank?
A. If I borrow of him I draw my check on him for the amount I wish him to lend me.
Q. But in each case the checks are certified by the cashier?
A. Yes, sir.
Q. What is the method where you buy or sell exchange; how is that paid for between banks?

123 A. Well, where we are loaning money it is generally for more than one day, sometimes only for a single day, but if I buy $10,000 New York funds of a bank, perhaps I give them either greenbacks, or my check on my own bank, or a certificate of deposit, which will come home in either case, I expect, and appear at my counter the next morning for settlement.
Q. Those certificates and checks are signed by you as cashier?
A. Yes, sir.
Q. And the same when it is bought of you?
A. Yes, sir.
Q. Do you make any inquiry, or do other cashiers make any inquiry of you, as to the authority of cashiers to transact this business?
A. I have never had any. I have been there a long time and I have never had any inquiry of that kind made.

Q. And never made any such inquiries on your own behalf?
A. No, sir.

On cross-examination he testified:

Q. Mr. Bartlett put the question to you whether cashiers bought and sold exchange of each other in behalf of banks, and you answered that general question in the affirmative. I wish to know whether your answer covered any more than New York funds?

124 A. I meant New York funds; I supposed from the question asked that it referred to New York funds, and so answered it.

Q. And limited to that?
A. Yes, sir.
Q. Who represented your bank at the meetings of the Clearing-House Association in the year 1866.
A. Well, ordinarily, I attend those meetings and represent the bank; occasionally our president will go in.
Q. Were you present at a meeting of the Clearing-House Association at which action was taken on the subject of certifying checks?
A. Yes, sir; I was.
Q. I refer now to the first meeting when action was taken?
A. I think I was at the meeting when the vote was passed.
Q. Did your bank receive any circular in consequence of that action?
A. It did.
Q. Have you that circular in your possession?
A. I have.
Q. Will you let us see it?
A. If the court says so.
Q. You are the recording officer of your bank?
A. Our book-keeper generally makes the record, but I attest it.
Q. He does the writing and you attest the record?
A. Yes, sir;
Q. You are the proper recording officer of the bank?

125 A. Yes, sir.

Q. Will you furnish us with a transcript of the action taken by your bank on this subject?
A. Yes, sir.
Q. Certified by yourself as recording officer?
A. Yes, sir.

Joshua Loring testified as follows:

Q. You are cashier of what bank?
A. The Blackstone National.
Q. How long have you been so?
A. Since its organization.
Q. Whether or not it is the practice of banks in this city to borrow money of each other, and buy and sell New York funds?
A. There is a custom.
Q. They do so?

A. They do, sir.

Q. To a large amount or small?

A. Large and small.

Q. Is there not a usage known to you as to what officers of the banks conduct these transactions with each other?

A. The cashiers, sir.

Q. That is the usage, is it?

A. Yes, sir.

Q. And what vouchers do they give in payment in these transactions, if they give any?

A. The cashier of a bank, who borrows of another bank, gives his cashier's check on that bank.

Q. On the bank of which he borrows?

A. Yes, sir.

Q. How with regard to the purchase and sale of New York funds?

A. He gives his cashier's check on New York and receives
126 greenbacks or a cashier's check for the same.

Q. He gives a cashier's check upon New York, and receives in pay either greenbacks or a cashier's check on the purchasing bank.

A. Yes, sir.

Q. This I understand you to be done through the cashiers?

A. Through the cashiers.

Q. Do you ever make any inquiry, or is any inquiry ever made of you, with regard to the authority of the cashier to do this?

A. I never heard any inquiry made.

On cross-examination he testified:

Q. Mr. Loring, I understand you to say that there is given in payment for the money borrowed a check on the lending bank—a check on the bank that lends the money?

A. That is the custom with the Blackstone Bank.

Q. When you give such a check as cashier, what entries concerning that check are made at your bank?

A. We credit the amount to the bank of whom we borrow.

Q. That is done by what officer in the first instance?

A. A ticket is passed to the teller, and goes from the teller to the book-keeper, who makes the entry.

Q. The cashier passes a ticket to the teller directing him, in substance, to credit that bank with that amount?

A. On receiving the money.

Q. Then on receiving the money he does credit that bank?

A. He credits the bank; yes, sir.

127 Q. And then the book-keeper, from the receiving teller's entry, also credits that bank?

A. The paying teller receives a ticket of this style. "Credit —— bank 30, $20,000," and holds it until he gets the money. He then passes it to the book-keeper, who makes the entry.

Q. You say "bank 30," each bank has its designating number?

A. It has. I meant 20 or $30,000.

Q. Each bank has a designating number at the clearing-house?
A. Yes, sir.
Q. Did your bank take action at any time on the subject of certifying checks?
A. We did, sir.
Q. You are recording officer of the bank, sir?
A. Yes, sir.
Q. Will you please furnish us with a copy of that vote certified by yourself?
A. Yes sir.
Q. I will ask you simply the fact whether your bank received a circular purporting to come from the clearing-house?
A. We did, sir.
Q. I did not quite understand what was put into the paying tellers drawer. You say some memorandum, what is that?
128 A. If I borrow money I make a ticket crediting the bank giving the name $20,000, say, and pass that to the teller with a check on the bank of which we are to borrow, and I receive the money through the messenger, and pass the ticket with other tickets to the book-keeper.
Q. (By the court:) Does it not remain in the till of your teller until he receives the money?
A. He holds it before him, until he receives the money.

Henry K. Frothingham testifies as follows:

Q. Of what bank are you cashier?
A. Massachusetts National.
Q. How long have you been so?
A. Since May, 1863.
Q. Have you been cashier of the Massachusetts since its organization as a National Bank?
A. No, sir; my predecessor was cashier when it was organized as a National Bank.
Q. At what time was your bank organized as a National Bank?
A. I think it was in 1863.
Q. Your predecessor was the first cashier?
A. Yes, sir. He died on the 23d of May, and I succeeded him on the 28th of May. I may be mistaken in regard to the precise date of the organization.
Q. Do the banks of this city borrow money of each other, and buy and sell exchange of and to each other?
A. They do so.
129 Q. They do buy and sell New York funds among themselves?
A. Yes, sir.
Q. Are these dealings of large or small amount?
A. Both large and small.
Q. Is there any usage known to you, as to what officers of the bank carry on and consummate these transactions?
A. I only know as far as my knowledge and experience extends.
Q. Do you mean your experience in dealing with the banks?

A. Yes, sir. If I wish to borrow money I go to the cashier of the bank of which I wish to borrow.

Q. And when they wish to borrow of you, who comes?

A. Generally, the cashier; sometimes the messenger is sent to knowif we have funds to loan.

Q. What voucher is given, or received by you, in such cases?

A. I always draw a check on the bank from which I borrow.

Q. Who signs it?

A. I sign it myself as cashier, and make it payable to the order of the teller of the bank.

Q. What sort of a voucher do you receive when you lend?

A. A check drawn by the cashier of the bank, to whom I lend the money on our bank.

Q. Now, when you buy and sell New York funds, what do you take, or what do you give?

A. Sometimes we give greenbacks, sometimes we give a check on our own bank.

Q. When you sell, what do you take?

A. When we sell, sometimes we take greenbacks, and some-
130 times a cashier's check.

Q. The New York exchange is drawn by whom?

A. The New York checks are signed by the president, unless he is absent, in which case it has to be signed by the cashier.

Q. You have also dealings in exchange with the funds of other cities, Philadelphia, Baltimore and Washington?

A. We have in Philadelphia.

Q. When you draw on Philadelphia, who signs the drafts?

A. The cashier signs it.

Q. Who makes the sale?

A. The cashier.

Q. Who takes the pay?

A. The teller.

Q. What does he take in pay?

A. He usually takes bank bills; sometimes he takes the check of the party to whom he sells.

Q. I mean in dealing with a bank?

A. He takes the cashier's check. That will not apply to Philadelphia, because our funds there are small, and we do not have enough to make it an object to sell to banks.

Q. Do you ever inquire, or have inquiry made of you, as to the authority of cashiers in these transactions?

A. No, sir.

On cross-examination, he testified:

Q. You say, you always draw a check on the bank from which you borrow?

A. Yes, sir.

Q. That check is made payable to the order of your teller, is it?

131 A. Yes, sir.

Q. And handed over to him?

A. Yes, sir.

Q. And he sends the messenger, and gets the money, does he not?

A. He sends the messenger.

Q. Does he receive the money before he parts with the check, or when he parts with the check?

A. He generally sends the check by the messenger, who brings back the proceeds.

Q. And he makes the corresponding entries in the book?

A. Yes, sir.

Q. And the book-keeper makes the corresponding entries from the teller's book?

A. He takes his data from the teller's book.

Q. Now, in regard to buying and selling exchange. Do you know of any general usage of the banks, in dealing with each other in respect to exchange, other than New York funds? Any general usage?

A. I do not, sir. I never have occasion to seek for anything else but New York funds, and for that reason I know of no other transaction.

Q. I understand you to say, that you do not know of any usage among the banks to deal with each other, in the manner you have described, except in reference to New York funds.

A. I have no knowledge myself.

Q. Are you the recording officer of your bank?

A. Yes, sir.

132 Q. Has your bank taken action on the subject of certifying checks?

A. Yes, sir.

Q. Will you have the kindness to furnish us with a copy of that action?

A. Yes, sir.

Jeremy Drake testified as follows:

Q. You are cashier of what bank?

A. Freeman's National,

Q. Do the banks of this city buy and sell New York funds of and to each other, and borrow money of each other?

A. Yes, sir.

Q. Large, or small amounts, sir, or both?

A. Well, sir, I don't know what would be considered a small amount. I never have known anything less than $5,000.

Q. How much is the maximum?

A. From that, up to any sum that may be wanted, $100,000 or more.

Q. Is there any usage as to what officers of banks conduct these transactions?

A. Yes, sir.

Q. Who do conduct them, sir?

A. The cashiers.

Q. What vouchers do they give, and receive in payment?
A. When they borrow money they give a check.
Q. What sort of a check?
A. They give a check for the amount, on the bank they
133 borrow of, with one exception, when I was requested to draw on my own bank.
Q. Who signs the checks, Mr. Drake?
A. The cashier.
Q. How in regard to exchange on New York bought and sold. What is given in payment for it?
A. Checks, or whatever may be agreed upon. If it is agreed to take greenbacks, we take them; if it is agreed to take checks, we take them.
Q. Are checks commonly used?
A. I should think that in buying New York funds, they were not used generally.
Q. Who draws the check on New York?
A. The bank.
Q. Who signs it?
A. The cashier.
Q. Who do you negotiate with for the purchase of New York funds?
A. The cashier of the bank, when we go to a bank.
Q. Do you ever ask for the authority of the cashier, or ever have the question asked you, in any of these transactions?
A. No, sir.
Q. When a check is given in part payment, or entire payment for New York funds, what is it, a check, by the cashier of the bank which sells, on his own bank?
A. On his own bank.
Q. In case you borrow money, and give a check drawn on
134 the bank you borrow of, to whose order do you make that check payable?
A. Well, sir; I don't usually make it payable to any one's order, I go down, being located some ways from State st., I go down to the bank, and draw my check, perhaps not making it payable to order, but generally write it, "payable to the Freeman's National Bank."
Q. Then do you indorse it?
A. No, sir.
Q. I understand you to say, you draw it on the bank you borrow it of?
A. Yes, sir.
Q. Do you hand such a check as that to the cashier that you borrow the money of, without indorsing it?
A. Yes, sir.
Q. Payable to the Freeman's National Bank?
A. Payable to the Freeman's National Bank, or bearer.
Q. You don't consider the Freeman's National Bank of any importance?
A. No, sir.

Q. You obtain the money yourself in that case?
A. Yes, sir, in that case.
Q. You don't employ any messenger?
A. Very seldom.
Q. What entries are made, at your bank, of these checks?
A. Well, sir, I inform the teller when I get back, what bank I have borrowed of, and the amount, and he credits that bank with it.

135 Q. And then it goes from his book to the book-keeper's entries?

A. Yes, sir.
Q. Are you the recording officer of your bank, sir?
A. I am, sir.
Q. Has your bank taken action on the subject of certifying checks?
A. Yes, sir.
Q. I will trouble you, if you will, to let us have a certified copy of that action?
A. Yes, sir.
Q. Where is your bank located?
A. 217 Federal st.
Q. About how far from State st.?
A. Well, sir, a large half mile.

John B. Wetherbee testified as follows:

Q. Cashier of what bank, Mr. Wetherbee?
A. North National.
Q. How long have you been so?
A. Since its organization, four years ago.
Q. Are the banks of this city in the habit of borrowing money of each other, and buying and selling New York exchange?
A. Yes, sir.
Q. Is there any usage, as to what officer shall conduct that business?
A. It is usually done by the cashier.
Q. What vouchers are given or received in these transactions?

136 A. In the case of the North Bank, if we borrow, I draw upon the bank from which I obtain the loan; if I loan the bank I make the loan to draws on the North.

Q. Large amounts, or small amounts?
A. Both large and small.
Q. Do you make any inquiry yourself, or have any inquiry made of you, as to the authority of the cashier you deal with?
A. None.
Q. Will you state what the habit is, in buying or selling New York funds?
A. We buy New York funds, and usually give legal tender notes for them, almost always.
Q. Who sells you New York exchange?
A. Cashiers of the different banks.

Q. Who signs the checks for New York exchange?

A. Generally the cashier.

Q. You negotiate with him for the purchase, and take his check for it?

A. Generally, not always.

On cross-examination, he testified:

Q. You are a recording officer of your bank, I suppose?

A. I am.

Q. Did your bank take action on this subject of certifying checks?

A. They did.

Q. Will you please to let us have a certified copy of these votes?

A. Yes, sir.

137 Q. When you draw on the bank you borrow of what do you do with the check?

A. Give it to the teller to credit the bank of which we borrow.

Q. Does he get the money?

A. No, sir. I sometimes go for it myself, and sometimes send the messenger, or the assistant cashier.

Q. It goes first into the teller's book, and then it goes into the book-keeper's book, I suppose?

A. Yes, sir.

Jonas Burnett testified as follows:

Q. Of what bank are you cashier?

A. Third National.

Q. How long have you been so?

A. Since its organization.

Q. Do the banks of this city borrow of, and lend money to, each other, and buy and sell New York funds?

A. It is the practice to borrow money of each other, and to buy and sell New York funds.

Q. Large amounts, or small, or both?

A. Various; large and small.

Q. Is there any usage as to what officers conduct these negotiations?

A. So far as I know it is done by the cashier.

Q. What voucher do you give and receive, or what is given and received, according to usage?

A. I give a check on the bank I borrow of for the amount I want to borrow.

Q. Signed by whom?

138 A. By myself.

Q. What do you receive?

A. I receive the same, generally.

Q. How is it when you buy New York funds?

A. I give my own check on my own bank.

Q. By your own check do you mean your private check?

A. My cashier's check?

Q. What do you receive when you sell New York funds?

A. I generally receive greenbacks.

Q. Do you make any inquiry in regard to the authority of the cashier you deal with?

A. I never have made any inquiry.

Q. Was any inquiry ever made of you as to your authority?

A. No, sir.

Q. When you buy New York exchange, of whom do you make the purchase, and who signs the draft?

A. The cashier.

On cross-examination he testified:

Q. These checks, which you draw on the bank you borrow of, you hand over to your teller?

A. Hand over to the teller, and he signs them also.

Q. He signs them?

A. Countersigns them.

Q. Does he enter them to the credit of the bank?

A. He enters them at the time.

Q. Then that entry goes on the book-keeper's book?

A. Yes.

139 Q. How is the check actually disposed of? How does it go to the other bank? Do you carry it, I mean, or send it by the messenger, or does the teller send it?

A. The teller sends it by the messenger.

Q. You are the recording officer of your bank, I suppose?

A. I am.

Q. Did your bank take action on this subject?

A. They did not.

Q. They did not take any action upon the subject of certifying checks?

A. No, sir.

Q. No action was ever taken?

A. No, sir.

Q. And of course, if they took no action, they never recorded any?

A. They had informal action; the matter was discussed; no formal action, no record was ever made; no vote was ever passed.

Q. What was that informal action that was not recorded?

A. I don't know.

Q. Whether until this affair in State street, in February, 1867, your teller ever countersigned the checks?

A. He always countersigned the checks. I always required it.

Edward S. Tead testified as follows:

Q. You are cashier of what bank?

A. Faneuil Hall National.

Q. Do the banks of this city borrow money of each other, and buy and sell New York funds, Mr. Tead?

140 A. Yes, sir.

Q. Large amounts, or small, sir?

A. Both, sir.

Q. Is there any usage as to what officers conduct the transaction?

A. Yes, sir.
Q. What officers are they?
A. The cashiers.
Q. What vouchers do you give and take in borrowing and lending money?
A. I draw my check on the bank of which I borrow.
Q. How is it when you lend? What check do you give them?
A. I get the check of the bank to whom I lend.
Q. Signed by whom?
A. The cashier.
Q. And your own is signed as cashier?
A. Yes, sir.
Q. How is it with regard to New York funds? Who do you negotiate with for the purchase of these funds?
A. The cashier.
Q. Whose check do you give for them?
A. The bank's.
Q. Signed by whom?
A. The cashier.
Q. When you sell New York funds what do you get for them?
A. Greenbacks.

Q. Is there any by-law of your bank in relation to the
141 cashier's power to buy or sell, borrow or lend, that you know?
A. No, sir.

Q. In these transactions do you ask for the authority of the cashier, or are you asked for your authority?
A. No, sir.

On cross-examination he testified:

Q. What entry do you make when you give a check for the money borrowed? What entries are made in the books of the bank?
A. I pass it to the receiving teller, and he credits the bank of whom we borrow.
Q. What is the form of the check you give?
A. It is the usual form of a check drawn by the cashier of the bank of whom I borrow, in the ordinary form.
Q. Then that check is given to the teller, and entered by him?
A. Yes, sir; the check is made payable to his order, and is endorsed by him.
Q. Then he enters it upon his record?
A. Yes, sir.
Q. When you draw on funds in New York, then, as I understand, you receive greenbacks in pay?
A. Yes, sir.
Q. Did your bank take any action in relation to the certifying of checks?
A. It did not, sir.
Q. Was there any informal action on that subject?
A. No, sir.

142 Q. Did you receive a circular from the clearing-house on the subject?

A. We did, sir.

A. T. Frothingham testified as follows:

Q. Of what bank are you cashier?

A. The Tremont National.

Q. Do the banks of Boston borrow money of each other, and buy and sell N. Y. exchange?

A. Yes, sir.

Q. Large amounts, or small?

A. Large and small.

Q. Is there any usage in regard to what officers that business is conducted by?

A. By the cashier.

Q. What do they give and receive in payment where money is borrowed, for instance? What vouchers?

A. They give cashier's checks.

Q. And receive cashier's checks?

A. Yes, sir.

Q. When New York funds are bought, who is the negotiation made with for the purchase of them?

A. The cashier.

Q. What do you pay for them, or what do you receive for them? In what form is payment made?

A. I never bought any New York funds myself, but I receive from the clearing-house current funds, either greenbacks or bills, or I sometimes pass it into the clearing-house in the morning?

143 Q. Pass in what?

A. Pass the check into the clearing-house?

Q. I don't quite understand this clearing-house transaction. Suppose a man comes and buys $50.000 New York exchanges, you say you send the charge into the clearing-house the next morning?

A. Send it in the same day.

Q. What does he give you by way of voucher?

A. It is charged against the bank who wants it.

Q. Without any voucher?

A. On a ticket.

Q. You put it on your ticket, send it in, and get your money?

A. Yes, sir; it goes into the clearing-house, and the clearing-house is responsible for the amount sent in.

Q. Unless they notify you before one o'clock?

A. Yes, sir.

Q. Do you make any inquiries, or are inquiries made of you, as to the authority of the cashier in these transactions? Does anybody ever question the authority?

A. No, sir; it comes from the cashier.

Q. Nobody ever asks you what authority the cashier has to do this?

A. No, sir.

Q. And you never ask for the cashier's authority?

A. No, sir.

Q. Is there any vote or by-law of your bank in relation to this subject at all, about giving cashier's checks?

A. No, sir; no law upon that.

144 Q. And no vote of the directors?

A. No vote of the directors.

On cross-examination he testified:

Q. What do you do with the check which you draw on the bank you borrow of?

A. Well, sir, I never have borrowed since we have been a National Bank?

Q. That side of the shears, then, you are not acquainted with; but other people borrow of you?

A. Yes, sir.

Q. What do you receive?

A. Receive cashier's checks invariably.

Q. Do you get the checks before you part with the money, or when you part with the money?

A. When we part with the money.

Q. What is done with that check in the other bank, before it comes to you? You don't know, I suppose.

A. I don't know what they do with it; I don't understand your question fully.

Q. Suppose another bank borrows of you, it draws a check on you, as I understand it?

A. Yes, sir.

Q. What is done with that check, in the borrowing bank, before it comes to you; you don't know?

A. I don't know.

Q. But when it comes to you, you part with the money?

A. Part with the money.

145 Q. Has your bank taken any action upon the subject of certifying checks?

A. I think it has. That is my impression. I never certify checks, but my impression is there was action taken; I will not be positive.

Q. Will you have the kindness to look and see, and if you find any vote let us have a copy of it.

A. I will.

Benj. Dodd testified as follows:

Q. You are cashier of what bank?

A. Atlantic National.

Q. Have been so since its organization?

A. Yes, sir.

Q. Do the banks of the city borrow and lend money to each other, and buy and sell New York exchange?

A. Yes, sir.

Q. Is there any usage as to who conducts these negotiations?

A. The cashiers, sir.

Q. What do they give or receive in payment?

A. When I borrow I give my check on the bank I borrow of; when I lend, I take the check of the bank I lend to.

Q. Signed by whom?

A. By the cashier.

Q. When you buy New York exchange, who do you buy of?

A. The cashier.

Q. Who draws the draft for the exchange?

146 A. The cashier.

Q. What do you give him as payment for it?

A. Greenbacks, occasionally, or currency.

Q. When you sell, what do you do?

A. The same.

Q. You don't take checks?

A. No, sir; don't take checks.

Q. Have you made any question as to the authority of the cashiers in these transactions?

A. No, sir.

Q. Or had that question put to you?

A. No, sir.

Q. Is there any by-law of your bank, or vote of the directors, in regard to your giving cashier's checks, when you borrow money?

A. No, sir.

On cross-examination, he testified:

Q. What do you do with the checks on the bank you borrow of?

A. I hand the check over to the teller, and he gives it to the book-keeper, who credits the bank I borrow of.

Q. To whom is that check made payable?

A. Made payable to the order of the teller, and by him endorsed.

Q. And does he send it to the bank, and get the funds?

A. Yes, sir.

Q. Of course it goes on his book, and from his book to the book-keeper's?

147 A. Yes, sir.

Q. Has your bank taken any action on the subject of certifying checks?

A. We have, sir.

Q. Will you let us have a copy certified by yourself, of that vote?

A. Yes, sir.

Q. When banks borrow of you, what do they give you?

A. They give cashier's checks.

Q. Payable to whom?

A. Usually to the teller, I think. Not in all cases. Perhaps it may be to bearer. I don't remember about it.

Q. Your recollection, however, is, that it is usually payable to the teller?

A. To the teller; that is our mode.

Q. You don't know about others?

A. No, sir.

Charles L. Lane, testified as follows:

Q. Of what bank are you cashier?

A. The Atlas National.

Q. Do the banks of this city borrow or lend to each other, and buy or sell New York exchange to each other?

A. They do, sir.

Q. Is there any usage as to what officers conduct the business?

A. Yes, sir; the cashier.

148 Q. Large amounts or small?

A. Large and small.

Q. What vouchers do you give or get in such transactions, where you borrow or lend?

A. When I borrow of a bank, I draw a check on that bank.

Q. Supposing you lend?

A. They usually draw on our bank—always draw on our bank.

Q. Those checks are signed by whom?

A. By the cashier.

Q. When you buy New York exchange, with whom do you negotiate?

A. The cashier.

Q. When the draft is drawn, who signs the draft?

A. The cashier.

Q. Who do you pay for it, and how do you pay for it?

A. When I buy New York funds, I usually give a certificate of deposit.

Q. When you sell New York exchange, what do you get?

A. Greenbacks, a check, or a certificate of deposit, as may be offered.

Q. What is meant by a "certificate of deposit"?

A. It is a paper certifying that the bank has deposited a certain amount in our bank, which goes into the clearing-house the next morning.

149 Q. Was any question ever made by you, or by others to you, as to the authority of cashiers to do this work?

A. Never, sir.

Q. Is there any by-law of your bank regulating it at all?

A. No, sir.

On cross-examination, he testified:

Q. When you give checks for money borrowed, to whom are those checks made payable?

A. Made payable to the order of our teller.

Q. And handed over to him?

A. I enter them on the tellers' book, and put them in his hands.

Q. Having endorsed them, I suppose he sends and gets the money?

A. He endorses them and sends the messenger to get the money.

Q. Of course he makes the appropriate entries on his book, or did you say you made them?

A. I make the entries.

Q. On his book?

A. On his book.

Q. Then the book-keeper takes from his book the appropriate figures, and so on, and enters them on the books of the bank?

A. Yes, sir.

Q. Has your bank taken action on the subject of certifying checks?

A. I think they have, sir.

150 Q. You are recording officer, are you not?

A. Yes, sir.

Q. Will you please examine and see; if you find anything will you have a certified copy made?

A. Yes, sir.

R. B. Conant testified as follows:

Q. Of what bank are you cashier?

A. Eliot National.

Q. How long have you been cashier of that bank?

A. Three years and twenty-nine days, sir.

Q. Do the banks of this city borrow money of each other, and buy and sell New York exchange?

A. They do, sir.

Q. Is there any custom or usage as to what officers these transactions are conducted by?

A. By the cashier, sir.

Q. Large or small amounts?

A. Both.

Q. When banks borrow of you, what vouchers do you get, or how do you get it paid?

A. If banks borrow of us, we get their cashier's check, and charge the same to them.

Q. Cashier's check on what?

A. On our bank.

Q. On your bank?

A. Yes, sir.

Q. How is it when you borrow?

A. I draw a check on the bank of whom I borrow.

151 Q. How about New York funds? Who do you buy them of?

A. We are not buyers, generally; we are sellers.

Q. Who conducts the sale—makes the negotiation?

A. The cashier.

Q. How are they paid for?

A. In various ways. Sometimes by charging through the clearing-house; sometimes by cashier's checks, and sometimes by greenbacks.

Q. How is the method of payment determined?

A. I generally arrange with the party who wants New York funds, and arrange as to what I shall charge him.

Q. Do you take any voucher from him, in that case?

A. I charge the check in settlement, as though I had a check on the bank, and they receive it in the clearing-house.

Q. You merely put it on the list, and get no voucher?

A. We don't get anything; it stands on the list as the other checks

do; it is usually drawn to the order of the bank with whom I negotiate in New York.

Q. When you sell, what do you get in pay?

A. In selling it, we charge it through the clearing-house. I draw my check through my correspondent in New York on the party with whom I have arranged the sale, and send it through the clearing-house, and in that way I get my pay.

Q. What voucher do you get from the party who buys?

152 A. No voucher at all.

You send your check that you draw with the list to the clearing-house?

A. Yes, sir.

Q. Will you explain a little more in detail? You deal with the cashier, you say?

A. Yes, sir.

Q. You give him what?

A. I go and ask him if he would like New York funds; if he says he would, I make an agreement with him to charge it through the clearing-house; upon that agreement I draw my check to his order, add it to the clearing-house slips, and it goes into the settlement, and my pay is got in the balance I get from the clearing-house.

Q. The check that you draw is what?

A. A cashier's check on my correspondent in New York.

Q. So that you give it to him and charge it to him again?

A. No, sir; the check itself goes with the clearing-house slip, in common with the other checks I may have on that bank.

Q. You don't get your check?

A. It don't come back to our bank; it is redeemed at our correspondent's in New York.

Q. It remains in the clearing-house, and they transmit it to your correspondent?

A. The check is taken by the representatives of the bank,

153 to whom I sell the check—by their clerk—and carried to their bank.

Q. It don't come back to you?

A. Not all, sir.

Q. Those checks that you get for borrowed money are always sent into the clearing-house the next day?

A. Not necessarily, sir.

Q. What does it depend upon?

A. If I borrow money of a bank, some of the banks charge it through the clearing-house: others, when they want it, notify us in the course of the day—"We shall be obliged to call upon you for this amount to-day," and it is paid.

Q. How is it paid?

A. In greenbacks or through the clearing-house.

Q Do you keep them out of the clearing-house at the request of cashiers?

A. It is not common for us to loan for a day.

Q. Is there any by-law, or vote of the directors, with regard to these transactions?

A. Not particularly, sir, I believe.

Q. Do you ever ask for the authority of the cashiers you are dealing with, or do they ever ask you for yours?

A. No, sir; we take them with authority.

Cross-examination.

Q. To whom is the check payable that you draw when you borrow?

154 A. When I borrow, I draw my check upon the bank of whom I borrow, and to the order of the teller, and it is by him indorsed.

Q. You hand it to him, he makes the proper entries and sends the check, and gets the money, after he has indorsed it?

A. Yes, sir.

Q. And the proper entries go from his book to the book-keeper's books?

A. An entry is made by the receiving teller on his book, and from that it is taken by the book-keeper, and entered upon the day book, and so on.

Q. And when checks are drawn on your bank—that is, when you lend, are they usually drawn to the order of your teller?

A. My impression is, yes, sir.

Q. Has your bank taken any action, on the subject of certifying checks by cashiers?

A. They have, sir.

Q. Will you let us have a copy of that vote, sir.

A. I will, sir.

Q. You are the recording officer, I suppose?

A. Yes, sir.

Henry W. Blasdale, testified, as follows:

Q. What bank are you chshier of?

A. I am cashier of the National Revere Bank.

Q. Do the banks of Boston borrow and lend each other money, and buy and sell New York exchange?

155 A. They do, sir.

Q. Large or small amounts?

A. Both large and small.

Q. Any usage as to what officers conduct that business?

A. It is almost invariably done by the cashier.

Q. In what form do they give the check in payment for borrowed money?

A. If we are borrowing money we give a cashier's check.

Q. Suppose you lend?

A. And if we are lending money we receive a cashier's check.

Q. What is the form of the check you give?

A. It depends upon circumstances. It is matter of arrangement.

Q. I mean in borrowing money?

A. Yes, sir.

Q. How matter of arrangement?

A. If I borrow money and desire that it shall remain but one day, I draw my check upon my own bank.

Q. Payable how?

A. That would depend upon where I draw it. If I draw it at the bank, I might draw it payable to the order of the teller. If I draw it on the bank where I get the loan, I should not.

Q. How when you lend? is it the same, or different?

A. When we lend, we are only careful that we get cashier's checks.

Q. What is the form of the cashier's check?

156 A. It is usually a check on our bank, the loaning bank.

Q. Payable to bearer, or order, or what?

A. I should say that the custom was various.

Q. How in regard to New York funds. When you buy New York funds, who do you buy them of?

A. We sometimes buy New York funds, but very seldom.

Q. When you do it, who do you buy them of, and what do you get?

A. We should buy in New York.

Q. With which of the officers of the bank should you deal?

A. I deal with the cashier.

Q. What do you take? Who gives you the draft, and how is it sent to New York?

A. If we were buying New York funds, I might pay for them in greenbacks, or national currency or in drafts on the clearing-house, if we were a creditor bank, or in my check on my own bank.

Q. If you were selling New York funds?

A. I would be ready to receive either one of those forms.

Q. What is a draft on the clearing-house?

A. At the close of our settlement at the clearing-house, we are either a debtor or creditor bank. If we are a creditor bank, we have a right to transfer that balance, if we so choose, to another Boston bank, and the draft, if you may so call it, is simply a transfer check of that balance.

157 Q. A check on the balance at the clearing-house?

A. Yes, sir.

Q. That is signed by you?

A. Yes, sir; signed by the cashier of the bank.

Q. In regard to these transactions, do you make any inquiry as to the authority of the cashier, or are you ever inquired of, as to your authority?

A. I don't remember any inquiry of that nature.

Q. Previous to the occurrences now under investigation, was there any by-law or vote of your bank, in relation to your power in this respect?

A. No, sir; there is no vote of the directors.

Q. No by-law in regard to it?

A. There is a general by-law, which I think defines our powers.

Q. Will you bring with you a copy of that by-law?

A. The by-law to which I refer is in general terms, and does not specify any particular acts.

Q. I think I know what it is. Will you be kind enough to bring us a copy, or the original?

A. Yes, sir; the by-laws of the bank are not in a separate book; they form a part of the records of the bank. Is it necessary that the records of the bank should be shown to the court? It is desirable that the book should not go out of the bank.

On cross-examination he testified:

Q. You say that when you borrow money, you draw on the bank from whom you borrow; and if you draw in the bank in your
158 own bank, you make it payable to the order of the teller?

A. I should.

Q. I am not asking you what you "should" do, I am asking you what you have done?

A. I have no fixed rule; I might, and might not.

Q. That is not the question, what you might or might not do. I am asking you your practice in point of fact. When you have drawn such checks in the bank, have they generally been drawn to the order of the teller?

A. Generally they have been drawn to the order of the teller.

Q. And that is your general usage?

A. That is my general usage, but not invariable.

Q. Now, have you any general usage about drawing checks out of the bank, differently from the way you generally draw them in the bank?

A. I should say, out of the bank it is only a matter of convenience.

Q. How are the proper entries made, in that case, on the books of the teller, and of the bank?

A. If I draw a check out of the bank, when I return to the bank, I give the teller a memorandum of the check I have drawn, and in cases where I draw a check out of the bank, I receive the money at the time, and with the memorandum that I hand to the teller I hand the money.

159 Q. Has your bank taken action upon the subject of certifying checks?

A. We have, sir.

Q. I will trouble you to furnish us with a certified copy?

A. Yes, sir.

Q. You are the recording officer, I suppose?

A. Yes, sir.

Q. Where is your bank?

A. 74 Franklin street.

Frederick L. Davis, testified as follows:

Q. You are cashier of what bank?

A. The Traders' National.

Q. How long have you been so?

A. Since its organization, sir.

Q. Do the banks of this city borrow money of each other, and lend, and buy and sell exchange upon New York?

A. Yes, sir.

Q. Is there any usage known to you, as to what officers transact all that class of business?

A. It is the common usage for the cashier to do it.

Q. Take borrowing first, if you please, how does the party borrowing pay; in what?

A. The party borrowing pays by greenbacks—cashier's checks.

Q. I refer to borrowing money now. What voucher does he give?

160 A. He gives his own check; gives a cashier's check.

Q. When he borrows he does not give greenbacks, does he?

A. No, sir.

Q. Gives cashier's checks?

A. Yes, sir.

Q. To whom is that transaction confined; this negotiation; is it conducted solely by the cashier's, or not?

A. Not solely but usually.

Q. In buying and selling exchange who make the negotiations?

A. The cashier, ordinarily.

Q. Exchange on New York, I mean.

A. Yes, sir.

Q. Who draws the drafts on New York?

A. The cashiers.

Q. Do these transactions involve large or small amounts?

A. Both.

Q. How is exchange usually paid for?

A. By cashier's checks, greenbacks, orders on the clearing house.

Q. When cashier's checks were given, prior to this transaction we are now investigating, what was the form of the check given?

A. There used to be a time when we were not so careful to have the check made payable to the teller; now it is a universal thing with us to have the checks made payable to the teller.

Q. Since which period?

161 A. Since the period we are now investigating. At the time this trouble occurred I became more particular. Since that time our checks have been invariably payable to the order of the teller.

Q. Before that time how was it then?

A. More frequently payable to the bearer.

Q. Did you ever hear any inquiries made as to the authority of the cashiers, or ever hear any question of the authority of cashiers in these transactions; did you ever hear any such thing?

A. I never heard of any such thing.

Q. Is there any vote of your directors regulating the powers of the cashier in such transactions?

A. Not to my knowledge, sir.

On cross-examination, he testified:

Q. Before the transactions which are now in question occurred, I understand you to say your bank was not careful to make the checks drawn by the cashier payable to the order of the teller; was the usage uniform or did it vary?

A. It varied before that time.

Q. There was no uniform usage either way, in your bank, I mean.

A. No, sir.

Q. And in the banks that dealt with you and gave you checks drawn on your own bank when they borrowed, what was the usage as to making the checks payable, of course before these transactions?

162 A. I don't think there was a universal custom to make the checks payable to the teller. I don't think it was so general as it is at the present time.

Q. Was it a general custom?

A. I think not, sir.

Q. Which was the most frequent, do you think, mode of doing it; take the banks that dealt with your bank?

A. I think the most frequent was to make them payable to bearer.

Q. In these cases where the checks were made payable to the bearer, what was done with those checks by the cashier?

A. They were handed ordinarily to the teller.

Q. And the bank credited by him?

A. Yes, sir; or by him passed to the book-keeper, who made the entries.

Q. Did he not enter on his own book anything on the subject?

A. Not in our bank, no, sir; he enters upon a slip or ticket which he passes to the book-keeper.

Q. The cashier leaves the check with the teller, as I understand?

A. Yes, sir.

Q. And it goes from the teller to the bank from which it is drawn, and thus the teller obtains the money?

A Yes, sir.

163 Q. Has your bank taken action on the subject of certifying checks?

A. I am not positive whether they have or not; my impression is they have.

Q. Will you look and ascertain the fact, and let us have, if you find any action, a copy of that record.

A. Yes, sir.

Q. Do you go and borrow money out of your own bank, or do you send?

A. I usually go; I go and send, both.

Q. When you go do you know where you are going to get the money?

A. When I start?

Q. Yes, sir.

A. No, sir.

Q. Where did you draw your check when you found out; did you before this transaction?

A. I sometimes drew it at the bank where I obtained the money.

Q. You say you sometimes drew checks in the bank where you got the money; was that the general custom?

A. No, sir.

Q. Was it not infrequent, comparatively?

A. Comparatively infrequent, sir.

164 Mr. Tyler testified as follows:

Q. You are cashier of the Suffolk National Bank?

A. Yes, sir.

Q. How long have you been?

A. Since the organization.

Q. The Boston banks borrow money of each other, and buy and sell New York exchange?

A. That is the custom.

Q. Is there any usage as to what officers conduct those negotiations?

A. The cashiers usually do.

Q. What vouchers do they take and give in those transactions?

A. Usually the check of the cashier upon the bank that lends the money.

Q. Prior to this affair we are investigating what was the form of the checks?

A. Usually payable to bearer.

Q. About New York funds; when they are bought and sold by whom is the transaction made?

A. With the cashier of the banks.

Q. Who draw the drafts on New York?

A. The cashiers draw the drafts.

Q. What was usually received in payment of them?

A. Legal tender notes, checks and orders on the clearing-house.

Q. Whose checks, sir?

A. Always signed by the cashier, or usually.

165 Q. Was there ever any inquiry as to the authority of the cashier, ever have any question made to you about the authority of cashiers in these transactions?

A. I have not.

Q. Is there any by-law or vote of your bank regulating the matter at all?

A. There is not.

Q. Sums large or small are involved in these transactions?

A. Both.

Q. How large; how much has been borrowed of you in that way?

A. Hundreds of thousands of dollars.

On cross-examination, he testified:

Q. What was the practice in your bank, when you borrowed money, as to the form of the check?

A. Drawn upon the bank of which we borrowed.

Q. Payable to whom in your bank?

A. Payable to bearer.

Q. That was your practice?

A. Yes, sir.

Q. What did you do with the check?

A. Ordinarily given to the teller, who sent and obtained the funds.

Q. Did the teller make an entry?

A. He would place the amount to the credit of the bank from whom we——

Q. And send the check and get the money?

166 A. Yes, sir.

Q. From his entry it went into the books of the bank?

A. Yes, sir.

Q. Has your bank taken action on the subject of certifying checks?

A. They never have.

Q. Do you know whether your bank had any notice from the clearing-house on the subject of taking action?

A. They did.

Q. But they took none?

A. Took no action.

A. J. Benyon testified as follows:

Q. You are cashier of what bank?

A. National Exchange.

Q. How long have you been so?

A. Since the organization.

Q. The banks of Boston borrow of each other, and lend each other money?

A. Yes, sir.

Q. Buy and sell exchange?

A. Yes, sir.

Q. Is there any usage as to who conducts these transactions?

A. The cashiers, ordinarily.

Q. What vouchers do they give and take in such matters?

A. Cashiers' checks.

167 Q. Prior to this matter we are investigating what was the form of those checks?

A. With us the form varied; sometimes payable to bearer, sometimes to the order of the teller, one teller or the other, as the case might be.

Q. The teller of one or the other of the banks?

A. No, sir; the receiving teller, or the paying teller.

Q. Sometimes the teller of the other bank?

A. No, sir; never.

Q. Sometimes to one of the two in your own bank?

A. Yes, sir.

Q. How was it before this outbreak in State st., before the failure of Mellen, Ward & Co?

A. There was no invariable practice with us.

Q. What was the general practice?

A. You mean in our own case?

Q. And the case of all other banks. I mean the usage.

A. I think it was about equally divided between the two; sometimes to the bearer, sometimes to the teller. My impression at this moment is that——

Q. Any inquiries ever made of you as to the authority of cashiers to do this?

A. I never heard of any, sir.

Q. Is there any by-law or vote of the directors regulating it?

A. Not in our case.

168 Q. New York funds, who did you buy them of?

A. The cashier, if he is present or disengaged.

Q. Who drew the drafts for the New York funds?

A. The cashier.

Q. How were they paid for?

A. In various ways; sometimes greenbacks, sometimes order on the clearing-house, sometimes certificates of deposit, and sometimes cashier's checks.

Q. In the case of orders on the clearing-house or certificates of deposit, were they signed by the cashier?

A. Yes, sir.

On cross-examination he testified:

Q. You stated that about the same nnmber of times, the checks would be made payable to the bearer, and to one or the other of the tellers. About equally divided, you think, which ever form might be used?

A. I think I did not say that. I was speaking of the custom in our own bank, sometimes one and sometimes the other teller; then the question was asked me what was the custom of the street, and I said it was then equally divided between the bearer and the teller of the bank.

Q. In your own bank you drew to the order of one or the other teller?

A. We do now.

Q. You did then?

169 A. Not invariably.

Q. Generally?

A. I should not say generally.

Q. How generally?

A. Well, it would be difficult to say exactly, or perhaps, even to approximate; sometimes one way and sometimes the other.

Q. There was no general usage then?

A. No, sir; nothing that could be called general usage.

Q. Which ever way you drew, did not the check go into the hands of the teller?

A. Yes, sir, always.

Q. And by him was credited to that bank, the amount credited to that bank?

A. By him or under his direction.

Q. He sent the check and got the money for it?

A. Yes, sir, ordinarily, unless he happened to be busy; in that case I would, perhaps, send the check out myself after the entry had been made.

Q. Generally he sent it?

A. Yes, sir.

Q. And he received the money?

A. Yes, sir.

Q. From the entries on his book the transaction went on to the book of the bank?

A. Yes, sir.

Q. Has your bank taken action on the subject of certifying checks?

170 A. We have.

Q. You are recording officer of the bank?

A. Yes, sir.

Q. Will you let us have a copy of that?

A. I will.

Q. You go out to borrow, do you not, sometimes?

A. I seldom borrow anywhere else, except out of the bank.

Q. You go yourself?

A. Yes, sir.

Q. Do you ever draw the check out of the bank?

A. I have done such things, although not often.

Q. When you make it out of the bank you give notice to the teller?

A. I tell him what I have done, and he makes the entry from my statement.

The plaintiffs then rested their case. The counsel for the defendant thereupon filed the following motion:

"Now after the close of the evidence offered on behalf of the said plaintiff corporation, the said defendant corporation moves the court here to instruct the jury that the evidence adduced by the said plaintiff corporation is not sufficient in law to warrant the jury to find a verdict in favor of the said plaintiff, under either of the counts
171 in its said declaration contained, and that as matter of law, the verdict of the jury upon each of the said counts should be for the defendant corporation."

Upon the argument of this motion, the counsel for the defendant proposed to read to the court a part of the by-laws of the defendant corporation, other than the 17th article, and one which the counsel for the plaintiff had not put in.

To this the counsel for the plaintiff objected, on the ground that no part of the by-laws except the 17th article was in evidence. But the court ruled that there was a right on the part of the defendant to use the other portions, that they might be used in the argument to the court, but they were not in as evidence adduced on the part of the plaintiff; that the question before the court was one of construction, and in construing the matter of the by-laws, although that article alone had been read to the jury, in considering the construction the court would allow the counsel to read it; that that, however, did not put it in evidence in the case. Should they afterwards desire it to go to the jury, it could be read to the jury; but upon the question of construction, that the court allowed other portions of the instrument to be read, just the same as in the case of a section of a statute the court would allow the reading of other protions of the statute. The court would not give one construction to this

172 by-law now, and when the other portions were read give another. The court would endeavor to give the true construction. That their ruling was made. As matter of evidence they consulted nothing else; as a matter of construction they would look at the paper and determine the meaning of the by-law.

The counsel for the plaintiff asked the court to note the saving of the ruling.

The presiding judge said, "I don't know that you can except; I don't know any course of business to which you can have exception in the course of a law argument."

The counsel for the plaintiff again asked the court to permit them to save it, if they could.

The presiding justice thereupon ruled, and instructed the jury, that in judgment of law the evidence would not warrant a verdict in favor of the plaintiffs, and that in judgment of law the verdict should be for the defendants.

The jury therefore rendered their verdict, "That the jury find that the defendants did not promise in manner and form as the plaintiffs have above declared against them." Which verdict was duly recorded. The plaintiffs then and there excepted to the ruling, and instruction and direction given as aforesaid by the presiding justice of
173 the court, and requested that their exceptions might be signed and sealed, and inasmuch as the matters herein set forth do not appear in the record, the same have been reduced to writing, and being found to be correct, this bill of exceptions is allowed by the court and directed to be filed as of the second day of November, 1868, before the jury left the bar.

[SEAL.] NATHAN CLIFFORD,
Associate Justice U. S. Supreme Court.

[SEAL.] JOHN LOWELL,
District Judge.

174 *Exhibit A.*

$250,000. BOSTON, *Feb. 28th*, 1867.

State National Bank:

Pay to J. K. Fuller, cash, or order, two hundred and fifty thousand dollars 00-100.

No. ——.

MELLEN, WARD & CO.

Good.
C. H. SMITH, *C'h'r.*

[2-ct int. rev. stamp, cancelled.]

Exhibit B.

275,000 dolls., 00 cts. BOSTON, *Feb. 28th*, 1867.

State National Bank, No. 40 State street, Boston:

Pay to J. K. Fuller, cash, or order, two hundred and seventy-five thousand dollars 00-100.

No. ——.

MELLEN, WARD & CO.

Good.

C. H. SMITH, *C'h'r.*

[2-ct. revenue stamp, cancelled.]

Exhibit C.

$75,000. BOSTON, *Feb. 28th*, 1867.

State Natinnal Bank:

Pay to gold, or bearer, seventy-five thousand dollars 00-100.

No. ——.

MELLEN, WARD & CO.

Good.

C. H. SMITH, *C'h'r.*

[2-ct. stamp.]

175 *Exhibit D.*

[Copy.]

THE MERCHANTS' NATIONAL BANK,
Boston, March 23d, 1867.

DEAR SIR: I have this day received your letter of the 21st inst., and in reply thereto, I have to state that on the 26th day of February, 1867, the cashier of this bank made an advance to Mellen, Ward & Co. of $250,000, in legal tender notes and currency upon $200,000 in gold certificates. No notes or other liability was taken from the parties for the amount of this advance. A check for $50,000 by way of memorandum was given by the parties to whom the advance was made, to be kept in the teller's cash in order to balance his cash account.

On the 27th of February a similar advance upon gold was made by the cashier for the same amount to the same parties, and in the same manner in all particulars, no note or other obligation for the amount thus advanced being taken.

Prior to the said 26th of February, the same parties had deposited in the bank about $90,000 in gold receiving therefor currency at the rate of $125 for $100 of gold. No note or other obligation was given on account of the same.

Gold certificates to the amount of $420,000, upon which advances as above stated had been made, were withdrawn from this bank on the next day, Feb. 28th, at half past one o'clock, by a de-
176 livery thereof, by the cashier of this bank, at the request of

the parties to whom the advances had been made, to the cashier of the State National Bank, he taking them in person, and delivering therefor to the cashier of this bank, two checks of the said parties upon the State National Bank, amounting to $525,000, certified as good on the spot by the cashier of the State National Bank.

On the same day, (Feb. 28th,) at about half past two o'clock, Mr. Fuller, the cashier, had left this bank, the cashier of the State National Bank, in company with Carter of the firm of Mellen, Ward & Co., again appeared at the counter of this bank, and received from the teller of this bank $60,000 in gold, and gold certificates, he, the cashier of the State National Bank, delivering therefor to the teller a check of Mellen, Ward & Co. on the State National Bank, for seventy thousand dollars, certified by him, the cashier, as good.

These transactions, in our view, are not deemed to be within the 29th section, which we supp ose did not apply to advances of this character, but was designed to exclude loans involving personal responsibilities of the borrowers; and the proviso of the section seems to indicate, that such is the true construction. I trust that you will concur with us in this view. In reply to the other portion of your letter, I have to state that the cashier of this bank is not in the habit of giving his own check upon the bank endorsed by the teller,
177 in payment of checks drawn by depositors, instead of paying the money on such checks; no such transaction has ever occurred in this bank to the knowledge of the president or directors.

Very respectfully yours,

(Signed) FRANKLIN HAVEN, *President.*

H. R. Hubbard, Esq., Comptroller of the Currency,
Washington, D. C.

178 *Exhibit E.*

DR.

35,000 gold		35,000
Pr'm and bal. on gov'm'ts		47,750
Demand		17,500
Amoskeag		8,000
		108,250
Int. due on loans	1,885 58	
Demand	414 42	
Amoskeag	118 67	
Loan 500 M	125	
	2,543 67	
		110,793 67
Am't rec'd		110,236 29
Bal. due		$557 38

CR.

Sold 35,000 gold	137½	48,125	
20 St. Louis bonds	78¼	15,260	
8 " " "	78¼	6,260	
13,000 5-20 July	106½	13,845	
2,500 7-30 Aug.	105¾	2,432	25
20 d's int.		9	20
700 7-30 July	105	735	
51 d's int.		7	14
250 sh's Co. Falls		5,668	18
250 " " "		5,580	68
8 " Amoskeag		11,123	84
Div.		800	
		110,236	29

March 12, 1867.

179 *Article of association.*

We, the undersigned, the directors of the State Bank, Boston, in the State of Massachusetts, having been authorized by the owners of two-thirds of the capital stock of said bank to change and convert the said bank into a national banking association, under and according to the provisions of the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and to execute articles of association, do hereby, in our own behalf, and in behalf of the stockholders, whom we represent, make and execute the following articles of association:

1st. The name and title of the association into which the said State Bank is to be changed and converted, shall be "The State National Bank of Boston."

2d. The place where its banking-house or office shall be located, and its operations of discount and deposit carried on, and its general business conducted, shall be the city of Boston, in the county of Suffolk, and State of Massachusetts.

3d. The board of directors shall consist of not exceeding
180 twelve stockholders. The regular annual election of directors shall be held on the second Tuesday of January of each year; but if no election shall be held on that day, it may be held on any other day, according to the provisions of the tenth section of the act, and all elections shall be held according to such regulations as may be prescribed by the board of directors of the association, not inconsistent with the provisions of the aforesaid act.

4th. The capital stock of this association shall be eighteen hundred thousand dollars, to be divided into shares of fifty dollars each; but the capital may be increased, according to the provisions of the thirteenth section of the act, to any sum not exceeding twenty hundred thousand dollars; and in case of the increase of the capital of

the association, each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock, as he may be entitled to, according to the number of shares owned by him before the stock is increased.

5th. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold his office (unless he shall become disqualified, or sooner removed by a two-thirds vote of all the mem-
181 bers of the board) for the term for which he was elected a director; and they shall have power to elect a vice-president, who shall also be a member of the board of directors, and to elect or appoint a cashier, and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue them in office, or to dismiss them, as in the opinion of a majority of the board, the interests of the association may demand. They also shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the acts aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make under said act for the general regulation of the business of the association, and the entire management and administration of its affairs; which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board.

182 6th. This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interests of the stockholders and creditors of the association, but subject to the restrictions, requirements and provisions of the act.

7th. These articles of association may be changed, or amended at any time by stockholders owning a majority of the stock of the association, in any manner not inconsistent with the provisions of the act; and the board of directors, or any three stockholders, may call a meeting of the stockholders for this purpose.

In witness whereof, we, the directors aforesaid, for ourselves as such directors, and in behalf of the stockholders of the State Bank,

Boston, have hereunto set our hands, this fourth day of April, eighteen hundred and sixty-five.

(Signed) JAMES McGREGOR.
SAMUEL T. DANA.
DANIEL N. SPOONER.
AMOS. W. STETSON.
JAMES P. MELLEDGE.
JAMES P. THORNDIKE.
ABNER KINGMAN.
JOHN FIELD.
JOSHUA STETSON.

[5-ct. stamp.]

183 STATE OF MASSACHUSETTS, *County of Suffolk, ss:*

On this fourth day of April, A. D. 1865, personally came before me, a notary public of said county, James McGregor, James P. Thorndike, Samuel T. Dana, Abner Kingman, Daniel L. Spooner, John Field, Amos W. Stetson, Joshua Stetson and James P. Melledge, directors of the State Bank, Boston, to me well known, who severally acknowledged that they executed the foregoing articles of association, for the purposes and uses therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

[SEAL.] (Signed) B. F. ADAMS,
Notary Public.

[5-cent U. S. stamp.]

I certify that the articles of association of the State National Bank of Boston, were executed in duplicate, and that one of the instruments so executed is the foregoing; and that the other, in all respects like the foregoing, and stamped in the same manner, is on file with said bank.

Dated Boston, April 4th, 1865.

(Signed) JAMES McGREGOR, *President.*

A true record. Attest:

JOHN G. STETSON, *Clerk.*

[5-ct. stamp.]

184 UNITED STATES OF AMERICA, *Massachusetts District, ss:*

I, John G. Stetson, clerk of the Circuit Court of the United States for the first circuit, Massachusetts district, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of The Merchants' National Bank of Boston vs. The State National Bank of Boston, in this court determined.

In testimony whereof I hereunto set my hand affix the seal of said court, at Boston, this twelfth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-third.

[SEAL.] JOHN G. STETSON, *Clerk.*

[5-ct. rev. stamp.]

185 THE UNITED STATES OF AMERICA:

To the State National Bank of Boston, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, district of Massachusetts, wherein the Merchants' National Bank of Boston is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this 27 day of November, in the year of our Lord one thousand eight hundred and sixty-eight.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

The State National Bank of Boston acknowledges due, sufficient and legal service of the within citation.

C. B. GOODRICH, *Attorney.*

186 *Bond on writ of error.*

Know all men by these presents that we, the Merchants' National Bank of Boston, as principal, and Benjamin F. Burgess, of said Boston, merchant, as surety, are held and firmly bound unto the State National Bank of Boston in the full and just sum of one thousand dollars, to be paid to the said State National Bank of said Boston, its certain attorney, its successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our successors, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately at a term of the Circuit Court of the United States holden at Boston, in the district of Massachusetts, in a suit depending in said court between the said Merchants' National Bank of Boston and the said State National Bank of said Boston, judgment was rendered against the said Merchants' National Bank, and the said Merchants' National Bank having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State National Bank citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now the condition of this above obligation is such, that if the said Merchants' National Bank shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its

plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

[L. S.] THE MERCHANTS' NATIONAL BANK,
By FRANKLIN HAVEN, *President.*

[L. S.] BENJ. F. BURGESS.

Signed, sealed and delivered in presence of—
T. K. LOTHROP.

Approved:

JOHN LOWELL,
District Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the Circuit Court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

SUPREME COURT OF THE UNITED STATES.

No. 391.

MERCHANTS' NATIONAL BANK OF BOSTON, PLAINTIFF IN ERROR,

vs.

THE STATE NATIONAL BANK OF BOSTON, DEFENDANT IN ERROR.

ADDITION TO RECORD AND STIPULATION OF COUNSEL.

FILED JULY 19, 1869.

In the above-entitled suit, the by-laws of the defendant corporation were inadvertently omitted in the transcript of the record from the circuit court, and it is agreed that the said by-laws, a printed copy of which is hereto anne'd, may be inserted as a part of the record of the case in the Supreme Court of the United States.

Boston, July 12, 1869.

T. K. LOTHROP,
For Pl'ffs in Error.
C. B. GOODRICH,
For Def'ts.

The State National Bank of Boston.—By-laws.

The State National Bank of Boston, organized under the act of Congress, entitled "An act to provide for a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864.

ELECTIONS.

Article 1. The annual meetings of the stockholders for choice of directors of this bank shall be held at its banking-house on the second Tuesday of January in each year, between the hours of ten and four of said day; of which meeting the cashier shall give thirty days' public notice, specifying the time, place, and objects of the same, by publication in one or more newspapers published in the city of Boston, as the

directors shall order. At every meeting of the stockholders the president shall act as chairman ex officio; but, in case of his absence, a chairman for that meeting shall be appointed by the stockholders present.

The cashier shall, ex officio, act as clerk of such meetings; but, in his absence, a clerk pro tempore shall be appointed by the meeting.

Art. 2. At all meetings for the choice of directors, the president or other chairman shall appoint three stockholders who are not directors to be judges of said election, who shall collect, assort, and count the votes, and report the result to the meeting. The said judges shall decide, in the first instance, on any question in relation to the right of voting, subject, however, to the final determination of a majority of the stockholders present. All the votes and doings of such meetings shall be forthwith recorded by the cashier or, in his absence, by the clerk pro tempore, in a book of records to be kept for that purpose; and the cashier shall notify the directors chosen of their election, and of the time when they are required to be at the bank to organize the board by the choice of a president; and if at such time a majority shall not be present, the number present may adjourn, and so from time to time until a quorum shall be present.

Art. 3. If, for any cause, the annual meeting shall fail to be holden on the second Tuesday of January, a subsequent day shall be appointed by the directors, of which notice shall be given, as provided by the tenth section of the act of Congress; and the proceedings shall be in accordance with the provisions of the first and second articles of these by-laws.

OFFICERS.

Art. 4. The officers of this bank shall be a president, cashier, and all such other officers as may be necessary for the prompt and orderly transaction of business, whose compensation shall be fixed by the directors.

Art. 5. The president shall hold his office (unless he resign or be removed) for the current year for which he shall have been elected a director; and if a vacancy shall occur in the office of president or in the board of directors during the current year, the same shall be filled by the vote of a majority of the board.

Art. 6. The cashier and the subordinate officers shall be appointed by, and shall hold their offices during the pleasure of, the directors.

Art. 7. The cashier shall be responsible for the moneys, funds, and all other valuables of the bank, and shall give bonds, with surety or sureties approved by the directors, in the penal sum of not less than thirty thousand dollars, conditioned for the faithful discharge of his duties, and that he will faithfully and truly apply and account for all such moneys, funds, and valuables, and will, on the order of the directors, deliver and pay over the same to the directors, or such person or persons as they shall appoint to receive them.

Art. 8. The tellers shall be responsible for all moneys and property whatsoever which may be placed in their hands by the cashier, or may otherwise come into their hands or possession by virtue of their office, and shall give bonds with such surety or sureties, approved by the directors, in the penal sum of not less than ten thousand dollars, conditioned for the faithful discharge of all their duties as such tellers, and that they will honestly and truly apply, account for, and pay over all moneys, property, funds, and effects whatsoever, which may come into their hands or possession by virtue of their office, to the cashier, or

proper demand, or to such other person or persons as the directors may appoint.

Art. 9. The other officers of the bank shall give bonds for the faithful and honest discharge of their respective duties, in such sums and with such security as the directors may require.

SEAL.

Art. 10. The seal of the bank shall have upon it the words, "The State National Bank, Boston." The following is an impression thereof:

CONVEYANCE OF REAL ESTATE.

Art. 11. All conveyances of real estate shall be made in the name of the bank, and under the seal thereof, and in accordance with the vote of the directors, and shall be signed by the president or, in his absence, by the cashier.

INCREASE OF STOCK.

Art 12. Whenever an increase of stock shall be determined on, agreeably to the provisions of the articles of association, notice shall be given to all the stockholders, and each stockholder shall be entitled to subscribe for the new shares in proportion to the number of old shares held by him; but if any stockholder shall neglect or refuse to subscribe and pay for the new shares to which he may be entitled, within the time limited by the directors, his right to such new shares shall be disposed of as the directors may think best for the benefit of the bank.

BUSINESS OF THE BANK.

Art. 13. The bank shall be open for business every day in the year, excepting Sundays and other legal holidays, during such hours as the directors may appoint, but not for a less time than from ten o'clock in the forenoon to two o'clock in the afternoon.

There shall be a standing committee of three appointed annually by the directors, whose duty it shall be to advise and consult with the president as to the discount and purchase of bills, notes, drafts, and acceptances, and other evidences of debt, during the interval between the meetings of the board; and the president shall make report of the doings of himself and the committee at each regular meeting of the directors.

RECORDS.

Art. 14. A book of records shall be kept by the cashier, entitled "Records of the State National Bank," in which shall be recorded the articles of association, the votes and doings of the stockholders, and all other matters in relation to the action of the corporation; as also all the votes and doings of the directors at their meetings, and, in the absence of the cashier, the records may be made and attested by the president.

TRANSFERS OF STOCKS.

Art. 15. The stock of the bank shall be assigned and transferred only at the bank, subject to the restrictions and provisions of the act of Congress, and in a transfer-book to be kept for that purpose, either by the stockholder in person or, in case of death, by legal representatives or by attorney specially authorized; and upon such transfer, the old certificates shall be returned to the bank and cancelled, and new certificates issued to the purchasers, expressing on their face the mode of transfer, which shall be signed by the president and countersigned by the cashier.

EXPENSES.

Art. 16. All the current expenses of the bank shall be paid by the cashier or by his order, who shall cause the same to be entered in detail upon a book to be kept for that purpose, and always open to the inspection of the directors.

CONTRACTS.

Art. 17. All contracts, checks, drafts, receipts, &c., shall be signed either by the cashier or by the president, and all endorsements necessary to be made by the bank shall be under the hand of the cashier or president; and, in case of the temporary absence of both of these officers, the directors shall appoint one of their number to perform such duty during such absence.

EXAMINATIONS.

Art. 18. The directors shall as often, at least, as once in every six months, either as a board or by committee appointed for that purpose, make a careful examination into the affairs and condition of the bank, and shall record the result of their examination, under their hands, in the records. They shall examine carefully the notes, bills, bonds, stocks, and other securities constituting the loan of the bank; they shall count the cash, and examine all the other assets of the bank in the hands of the tellers and cashier, and compare the balances in the general statement of the bank with the balances on the ledger, and see that the books are kept in a clear and methodical and correct manner; and especially when they examine the cash, it shall be done without the previous knowledge of the tellers of their intention to make such examination at any particular time.

MEETINGS.

Art. 19. The regular meetings of the directors shall be on Monday and Thursday in each week, at one o'clock p. m.; but special meetings may be called at any time by the president or cashier.

QUORUMS.

Art. 20. A majority of the directors shall constitute a quorum for the transaction of all business; provided, however, that for the ordinary business of discounting those present shall constitute a quorum, though less than a majority of the whole number.

DIVIDENDS.

Art. 21. Dividends of profits, if any, shall be payable on the first day of April and October in each year; but if the first day be Sunday or other holiday, then on the next day when the bank will be open for the transaction of business.

AMENDMENTS.

Art. 22. These by-laws may be altered or amended at any meeting of the directors, by a majority of the whole number, provided that notice of the proposed alteration or amendment shall have been given at a previous meeting, and the time fixed for acting upon it.

United States Supreme Court.

No. ~~391~~ 175.

THE MERCHANTS NATIONAL BANK

vs.

THE STATE NATIONAL BANK.

BRIEF FOR PLAINTIFFS.

BOSTON:
1870.

United States Supreme Court.

No. ~~201~~ 175.

THE MERCHANTS NATIONAL BANK

vs.

THE STATE NATIONAL BANK.

BRIEF FOR PLAINTIFFS.

ABSTRACT OF THE PLEADINGS.

THE action is assumpsit. The first and second counts allege that Mellen, Ward & Company, on the 28th of February, 1867, drew their checks upon Defendant Bank for the sum of $250,000, $275,000, and $75,000, respectively, each payable to order of Plaintiffs; and, for the purpose of enabling Defendant Bank to obtain from Plaintiff certain coin certificates and coin, the property of Plaintiffs, delivered the checks to Defendant Bank. That Defendant Bank thereupon, in consideration that Plaintiff would and did deliver to Defendants said coin certificates and coin, declared to Plaintiffs that the checks were good, and that Defendants had money of Mellen, Ward & Company, to pay them, and in consideration of the delivery to Defendants by Plaintiffs of the coin certificates and coin, Defendants delivered the checks to Plaintiffs, and promised Plaintiffs to pay the same on presentment, but afterwards, on due presentment, refused to pay the same.

The third, fourth, and fifth counts are founded each upon one of the checks respectively, alleging its delivery by Mellen, Ward & Company to Defendants, a certificate as to each by Defendants' agents, duly authorized, that it was good; and that Defendants had funds of the drawers, and would pay it on presentment; that Plaintiffs for value, received it of Defendants, and afterwards presented it and payment was refused.

The sixth, seventh, and eighth counts are founded each upon one of the checks, and allege the certificate that they were good, by the agent of the Bank, in form, as in the preceding count; that Mellen, Ward & Co., for value, delivered it to Plaintiffs, and Plaintiffs received it, relying on the certificate and acceptance, and that subsequently payment was refused by Defendants.

The ninth count avers the ownership by Plaintiffs, on 28th of February, 1867, of gold and gold certificates of the value of $600,000, and that Defendants in consideration that Plaintiffs would sell and deliver the same to them, promised to pay Plaintiffs therefor $600,000; that

Plaintiffs did sell and deliver the same to Defendants accordingly, and requested payment, which Defendants refused.

The tenth count is *quantum valebat;* but upon a sale of the coin certificates and coin, and the eleventh count is for money had and received.

The general question of the cause is, whether the ruling of the Court below on Defendants' motion after Plaintiffs' evidence was in, "That in judgment of law the evidence would not warrant a verdict in favor of the Plaintiffs, and that in judgment of law the verdict should be for the Defendants," (Record, p. 85), ought to be supported, or whether upon the settled rules governing the administration of justice, the cause should have been submitted to the jury; — and before proceding to an examination of the position of the cause when the ruling was made, it is fit to remark that *such motion and ruling are a substitute for a demurrer to evidence, and subject to all the rules that apply to such demurrer.*

Suchard *vs.* Allen. 1 Wallace, 259.

PLAINTIFFS' CLAIM.

The claim of Plaintiffs was, that Defendants, through their cashier, contracted to purchase of Plaintiffs, on the 28th of February, 1867, coin and coin certificates of the value of $600,000; that delivery was made of the same under the contract, and that the purchase money has never been paid, unless the certified checks delivered by Defendants' cashier to Plaintiffs, as such, constituted legal valid contracts binding the Defendants.

Put in a narrative form, the evidence as to the contract and its attending circumstances, stands thus — (Whether it or any part of it was open to attack as incredible by reason of bias, inconsistency, or other cause, is not a subject to be discussed in the present attitude of the cause) :—

February 23d the Plaintiffs were applied to by Mellen, Ward & Company, brokers, with the statement that they were about to purchase in New York, "for responsible parties," $300,000 or $400,000 of gold, and with the request that Defendants would *take and pay for* the gold as it came from New York at $1.25 in currency; that these responsible parties *would be prepared to take it in a few days*, and that when thus taken away it would go through probably some other Bank, mentioning, perhaps, the State Bank. (Fuller, Record, p. 27. Haven, Record, pp. 8-9.)

The proposition was accepted upon terms previously fixed in similar transactions, viz.: that the gold should be a purchase by the Bank, with a right of repurchase by Mellen, Ward & Company, on repayment of the cost and a premium "equivalent to interest on the amount invested by the Bank on the gold." (Haven, Record, p. 9. Fuller, Record, p. 28.)

Under this arrangement, Plaintiffs on notice from Mellen, Ward & Company, on 26th and 27th of February, took from the Second National Bank, and paid that Bank for the same, $400,000 gold certificates, which had never been in the hands of or owned by Mellen, Ward & Company,

and added the same to the gold of the Bank. (Fuller, Record, pp. 27–28. Davis, Record, pp. 19–23.)

On the 28th of February, Smith, the cashier of Defendants came to Plaintiffs' Bank, in company with Carter, of the firm of Mellen, Ward & Co., and stated to Plaintiffs' cashier, "we have come in to get an amount of gold," and that he "*would pay for the gold by certifying the checks when he saw that the gold was all right.*" The coin certificates to the amount of $400,000 were by Plaintiffs' cashier, "*passed out to Mr. Smith*, he counted them, and then handed to Plaintiffs' cashier the two checks of Mellen, Ward & Company, on the Defendants' Bank, certified 'good, C. H. Smith, Cashier.'" (Fuller, Record, pp. 28–29. Davis, p. 19.) On the same day the Defendants' cashier (Carter accompanying him) applied to and received *from the teller* of Plaintiffs' Bank $60,000 more of gold which the Bank had previously purchased at the request of Mellen, Ward & Company, upon the same terms as above stated. *The cashier was absent, and the teller took from Smith in payment a check for* $75,000, similar to the above, for the reason, as he says, that "I delivered the gold to the cashier of the State Bank." (Davis, Record, p. 20.)

To these facts it is material to add, that there is not in the record the slightest suggestion or proof that Plaintiffs' cashier, in the sale and delivery of the gold acted otherwise than with perfect good faith, or had any reason to suspect that the transactions were not by and for Defendants.

I.

In this condition of the proofs as to the fact of the contract and delivery under it, and with no evidence offered by Defendant at this or any other stage of the cause, that the gold did not go to the use of the Defendants, it remained for Plaintiffs to show that Defendants' cashier had authority to make for them the purchase and take delivery of the gold; and to offer evidence, if they saw fit, upon the further question, whether if the cashier had such authority, he had also authority to certify and deliver the checks in payment of the purchase money.

1st. The first step in the proof was to show what by Defendants' charter and by-laws were the defined powers of the cashier, and it was shown:—

That by the "National Currency Act" of 1864, chap. 106, sect. 8, it is provided that the Corporation may "by its board of directors appoint a President, Vice President, *Cashier* and other officers, *define their duties*," require bonds, &c.

If we examine the by-laws of Defendants, it appears that the duties of the cashier were not "defined," except that by article 1st, he is to notify corporate meetings and act as clerk at said meetings: and by Article 7th he is to be "responsible for moneys, funds, and all other valuables of the Bank"; by Article 11th either he or the President are to sign all conveyances of real estate voted by the Directors; and by Article 17th, "all contracts, *checks*, drafts, *receipts*, &c., shall be signed either by the Cashier or by the President," and also all endorsements necessary to be made by the Bank.

2d. It thus appears that the By-laws (which by the 8th section of the charter are to be made by the Directors) failed, as to the principal duties usually performed by Defendants' cashier, to make any provision; and yet the nature of these duties are such that it would be impracticable to perform them by special vote of Directors.

3d. There was thus raised one of the principal questions of the cause, viz.: In the absence of any vote of the Directors defining, in pursuance of the provisions of the charter, the powers and duties of a cashier, how are those powers and duties to be known and proved?

The Defendants contended that these powers and duties, under such circumstances are fixed and limited by various decisions of this Court, and of the courts of some of the States in cases in which a particular exercise of power was drawn in question, and that those decisions exclude the power exercised in this case.

The Plaintiffs contended that the Court cannot judicially know what, in the absence of powers defined by charter, by-laws, or vote, are the duties of a cashier under all circumstances and in all States or localities, and that the question is one of pure fact in each case, dependant on the proofs, and that such proofs may consist either of: —

Evidence of the powers usually exercised by the cashier of the Bank in question, acquiesed in by the Bank, or, —

Evidence of the powers commonly exercised by cashiers of all Banks in the State, or community, in which the Bank in question is by law established; which, in the absence of all by-laws, votes, or other determination by such Bank of the powers of its cashier, may be safely acted on by the public.

II.

As to Defendants' view, that in the absence of definition by charter, by-law, or vote, the law prescribes the extent and limit of the powers of a cashier, it is submitted that it is supported neither by principle or authority.

1st. Doubtless there exist classes of commercial agencies, whose powers and duties are so fixed and defined by the common law, after ages of judicial proof and investigation, that they are not only no longer the subject of enquiry but cannot be varied and controlled as against the public by proof of special contract limiting those powers. Such are partners, shipmasters, brokers, factors, &c. The powers and duties of such agents are fixed by the law, not in the absence of powers prescribed by writing or contract (as is claimed for cashiers), but in utter disregard of such prescription. But a cashier, the offspring of modern commerce, is, as stated by Baron Parke of bill brokers, "*not a character known to the law with certain prescribed duties, but his employment is one that depends entirely on the course of dealing.* It may differ in different parts of the country. The nature of these powers and duties in any instance, is a question of fact, and is to be determined by the usage and course of dealing in the particular place."

(Foster *vs.* Pearson. 1 Cromp. Meeson & Ros., 858.)

That this is the precise doctrine applicable to cashiers, is obvious, since even the Defendants must admit that, in the absence of regulations

by charter, by-law, or vote, the powers and duties of a cashier may be shown by the course of dealing committed to his charge by the Bank. Now if this be so, Defendants' proposition must be, that in the absence of all regulation by charter or vote, and of all evidence of the powers actually exercised by a cashier with the knowledge and ratification of the Bank, the law prescribes the powers of a cashier. The value of which doctrine, if true, will appear, whensoever such a state of facts shall (if ever) occur.

2d. But it is further submitted that in no one of the cases decided by this Court and relied on by Defendants, — nor, as it is believed, in any decision of a State Court, — has the Court attempted to *rest its decision* upon an assumed judicial knowledge of the common law, powers and duties of a cashier, where the acts in question were within the pale of the charter.

There are in several of the cases *recitals* of what the Court suppose are the ordinary powers of cashiers, but no judicial decision has turned upon those recitals.

Fleckner vs. *Bank of U. S.*, 8 *Wheaton*, 338, is believed to be the earliest case. The question was, whether a Cashier had a right to endorse the note in suit. In the course of the judgment it is said (pp. 360–1–2) "we are *very much inclined to think*" that the endorsement falls within the ordinary duties and rights of a Cashier, *at least if his office be like that of similar institutions.* "The Cashier is usually," &c. "*It does not seem too much to infer.*" "But waiving this consideration." *The case is decided on another ground.*

U. S. Bank vs. *Dandredge*, 12 Wheaton, 64, was debt on a cashier's bond. The Court say, "If officers of a Corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the Corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed." (p. 70.)

"The Cashier was duly appointed, and he was permitted to act in his office under the express sanction of the Directors for several years. If he had never given any bond whatever during the period, yet his acts within the scope of his authority would have bound the Bank."

Miner vs. *Bank of Alexandria*, 1 *Peters* 46, was debt on a cashier's bond; the defence set up a usage sanctioned by directors, to allow parties to overdraw, and the case was decided on the ground that it was "a usage to misapply the funds of the Bank and connive at their withdrawal, "*and could not be supported by any vote of the Directors, however formal,*" (p. 72.) The case states with great fulness the rights of the public in dealing with the officers of Banks. "The ordinary usage and practice of a Bank, in the absence of counter proof, must be supposed to result from regulations prescribed by the Board of Directors, &c. It *would be not only inconvenient, but perilous, for the customers or any other persons dealing with the Bank, to transact their business with the officers upon any other presumption.* The officers of a Bank are held out to the public as having authority to act according to the

general usage, practice, and course of their business, and their acts within the scope of such usage, would bind the Bank in favor of third persons having no other knowledge."

Then follows next the case of *Bank of U. S.* vs. *Dunn*, 6 *Peters*, 51, in which the defence was set up by an endorser that prior to the discount of the note, both the President and Cashier represented to him that the note was secured and his liability nominal. The evidence was held as inadmissable both as contradicting the note and upon the ground that "*all discounts are made under the authority of Directors, and it is for them to fix any conditions.*" "The agreement was not made by persons who have power to bind the Bank *in such cases*, nor have they power to bind the Bank except in discharge of the ordinary duties." There is no other or further remark in the case as to powers of Cashiers.

The last case is the U. S. *vs.* Bank Columbus, 21 Howard, 356. The question at issue was the authority of the Cashier to contract with the United States in the name of the Bank for the gratuitous transfer of $100,000 from New York to New Orleans.

The important feature of the case as showing that it really decided a question *of corporate powers* is, that there was no offer of evidence to show the extent and character of the functions actually entrusted in the course of its business by this Bank to its Cashier, from which the inference might be drawn whether the Bank had or had not entrusted him with powers involving the same principle. Now as to this case we submit:—

1st. That although it recites from Fleckner *vs.* Bk. of U. S. (a case as we have seen not decided on that point), the statement there made as to the powers and duties with which it was believed by the Court that a Cashier is "usually entrusted," and declares them to be his "ordinary duties"; and although it states what, if it had been the turning point of the case, would surely deserve revision, viz: that in no case has the term "ordinary business been judicially allowed to comprehend a contract made by a Cashier *without an express delegation* from *a Board of Directors to do so, which involves the payment of money*," (p. 364,) — yet, notwithstanding these recitals, the case must be taken to have been really decided upon the ground that the contract to transfer the $100,000 was *extra vires*. Thus the Court state (p. 365) "we think the safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business from which contracts are alleged to have been made, *to test that fact by an inquiry into the corporate ability* which has been given to them and to their subordinate officers, *or which the Directors of the Company can confer* upon the latter to act for them. Such was the view of this Court which decided the case of U. S. Bank *vs.* Dunn, 6 Peters."

Unless the case was decided on this point, no reason could have existed for making the foregoing a part of the judgment.

2d. This is further shown by the fact that treated as a judicial decision of the common law powers of a Cashier in the absence of charter regulations, by-law or vote, it can hardly be supported by any of the authorities cited in the judgment, and that, as has been shown, cashiers must belong to the class of agents stated by Baron Park, as "not a character known to the law."

III.

The foregoing view of Plaintiffs as to the judicial knowledge by the Court (without evidence) of the powers and franchises of cashiers, have been submitted, because they formed the staple of Defendants' argument below. But it will be found, as we think, to be aside from the real contest which turns it, is submitted upon the following propositions, which, if successfully maintained by Plaintiff, are decisive on the question whether the case was properly withdrawn from the jury: —

(a.) If in the absence of regulation by charter, by-law or vote, and with no evidence as to the powers actually exercised by the cashier, and acquiesced in by the Bank, nor of the powers usually entrusted to cashiers of banks established in the same community, the Court can judicially know what the powers and duties of such cashiers are — yet it is a principle perfectly well settled, that under the foregoing circumstances, (and even when by-laws and votes on this subject exist,) evidence of the powers habitually or usually exercised by the cashier, with the knowledge and acquiescence of the Bank, defines and establishes as to the public these powers, provided that the powers thus exercised may, without violation of the charter, be by the Directors or Corporation conferred on such cashier.

(b.) The evidence offered by Plaintiffs at the trial of the cause was competent and sufficient to have been submitted to the jury, on which they might lawfully find that the powers habitually or usually exercised by Defendants' cashier, with their knowledge, embraced the power to make for the Defendants the contracts declared on or some one or more of them, and that such powers might, without violation of the charter or law, be confided to such cashier.

IV.

The soundness of the first of the above propositions is almost too obvious to require citations to support it. To hold that the public may not safely confide in the existence of powers which by charter can be lawfully delegated and which are openly exercised, but must investigate and find if those powers have been the subject of by-law or vote, and act accordingly, would not only suspend the business of commerce, but tend to make transactions with corporations a snare and a cheat.

Plaintiffs content themselves with a reference to the doctrine as stated in the decisions of this Court already cited, and to a few other cases and treatises *viz.:*

U. S. Bank *vs.* Dandridge, 12 Wheaton, 64–70.
Miner *vs.* Bank of Alexandria, 1 Peters, 46–70
Story's Agency, ed. of 1863, §§ 114, 116.
Wild *vs.* Bank of Passamaquoddy, 3 Mason,
Nichol *vs.* U. M. Ins. Co., 3 Wood & Minot,

+ (Manle J.) in Smith v. Hale Glass Co. 8th C

general usage, practice, and course of their business, and their acts within the scope of such usage, would bind the Bank in favor of third persons having no other knowledge."

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1st. That although it recites from Fleckner *vs.* Bk. of U. S. (a case as we have seen not decided on that point), the statement there made as to the powers and duties with which it was believed by the Court that a Cashier is "usually entrusted," and declares them to be his "ordinary duties"; and although it states what, if it had been the turning point of the case, would surely deserve revision, viz: that in no case has the term "ordinary business been judicially allowed to comprehend a contract made by a Cashier *without an express delegation* from *a Board of Directors to do so, which involves the payment of money*," (p. 364,) — yet, notwithstanding these recitals, the case must be taken to have been really decided upon the ground that the contract to transfer the $100,000 was *extra vires*. Thus the Court state (p. 365) "we think the safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business from which contracts are alleged to have been made, *to test that fact by an inquiry into the corporate ability* which has been given to them and to their subordinate officers, *or which the Directors of the Company can confer* upon the latter to act for them. Such was the view of this Court which decided the case of U. S. Bank *vs.* Dunn, 6 Peters."

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III.

The foregoing view of Plaintiffs as to the judicial knowledge by the Court (without evidence) of the powers and franchises of cashiers, have been submitted, because they formed the staple of Defendants' argument below. But it will be found, as we think, to be aside from the real contest which turns it, is submitted upon the following propositions, which, if successfully maintained by Plaintiff, are decisive on the question whether the case was properly withdrawn from the jury: —

(a.) If in the absence of regulation by charter, by-law or vote, and with no evidence as to the powers actually exercised by the cashier, and acquiesced in by the Bank, nor of the powers usually entrusted to cashiers of banks established in the same community, the Court can judicially know what the powers and duties of such cashiers are — yet it is a principle perfectly well settled, that under the foregoing circumstances, (and even when by-laws and votes on this subject exist,) evidence of the powers habitually or usually exercised by the cashier, with the knowledge and acquiescence of the Bank, defines and establishes as to the public these powers, provided that the powers thus exercised may, without violation of the charter, be by the Directors or Corporation conferred on such cashier.

(b.) The evidence offered by Plaintiffs at the trial of the cause was competent and sufficient to have been submitted to the jury, on which they might lawfully find that the powers habitually or usually exercised by Defendants' cashier, with their knowledge, embraced the power to make for the Defendants the contracts declared on or some one or more of them, and that such powers might, without violation of the charter or law, be confided to such cashier.

IV.

The soundness of the first of the above propositions is almost too obvious to require citations to support it. To hold that the public may not safely confide in the existence of powers which by charter can be lawfully delegated and which are openly exercised, but must investigate and find if those powers have been the subject of by-law or vote, and act accordingly, would not only suspend the business of commerce, but tend to make transactions with corporations a snare and a cheat.

Plaintiffs content themselves with a reference to the doctrine as stated in the decisions of this Court already cited, and to a few other cases and treatises *viz.:*

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Wild *vs.* Bank of Passamaquoddy, 3 Mason, 505.
Nichol *vs.* U. M. Ins. Co., 3 Wood & Minot, 530.

+ (Maule J.) in Smith v. Hull Glass Co. 8th C. B. 668 – 11th C. B. 897.

So far as the public are concerned it is wholly immaterial whether the powers thus exercised are in disregard of the By-Laws of the Corporation or not, provided they are within the corporate powers conferred by the Charter.

Agar v. Ath. Ins. Co. 3 C. B. N. S. 725
Royal Bank v. Ingraham, 6th Ell. & Bl. 327
Prince Wales Ins. Co. v. Ath. Ins. Co. 3 C. B. N. S. 756 note.

V.

The struggle of the cause in Plaintiffs' view will be upon the second proposition, embracing as it does both law and fact, *viz.*: Was the evidence offered by the Plaintiffs competent and sufficient to be submitted to a jury in support of the claims made by the declaration? And —

1st. The main original contract (laying aside for the present the question of certified checks) as claimed by Plaintiffs, and of which evidence (sufficient at least to be submitted to the jury) was offered by them, was a contract for the purchase and delivery of gold by Plaintiffs to Defendants.

2d. The charters of both Banks in terms authorized them to carry on the business of banking by (among other things) "*buying and selling exchange, coin and bullion*," so that the contract set up by Plaintiffs was within the corporate powers of both parties. (Act of Jan. 3, 1864, sect. 8.)

3d. The transaction then being legitimate, and in its character forming part of the business of both Banks, the principal question is, have the Plaintiffs forever lost this large sum of money by improperly confiding in the assumed powers of Defendants' cashier. The buying and selling of gold must of course be intrusted, under general powers, to some officer of the Bank. A vote of Directors authorizing each daily or hourly transaction would be impracticable.

4th. In this attitude of the case, Plaintiffs now ask the attention of this Court to the evidence offered by them as to the powers habitually exercised with the knowledge of Defendants by their Cashier, to the end that the correctness of the ruling withdrawing the case from the jury may be determined.

5th. In connection with this they further ask attention to the evidence of the officers of numerous other National Banks established at Boston, as to the powers and duties usually exercised by their cashiers in dealing with the public and with other Banks. The competency of which evidence is thus declared by the Court.

"Considering that all Insurance Companies in Boston have similar charters, and the same kind of officers to conduct their business, we think that there is competent evidence that Presidents of Insurance Companies in that city are generally held out to the public as having authority to act in this matter," *viz.*: to make oral insurance." (Com.

Ins. Co. *vs.* Union M. Ins. Co., 19 Howard, 318. See 19 Pa. State Reports, 172. Ang. & Ames Corp., 8 Ed., p. 298.

VI.

Before analyzing the testimony Plaintiffs desire to submit their view of the legal principles that are to govern its application, *viz.:*

1st. Where the authority of an agent is left to be inferred by the public from powers usually exercised by the agent.

It is sufficient if the transaction in question involves precisely the same general powers though applied to a new subject matter. Were this otherwise, the general authority to make purchases in the usual course of the business of the principal, could never be relied on, unless upon proof of previous purchase of the identical article, the authority to purchase which is in controversy.

Thus if it be shown that Defendants' cashier had habitually, with the knowledge of the Bank, dealt with the public as authorized to buy and sell exchange, and still more if that power is shown to have been habitually exercised by the Cashiers of all other Banks established in the same community and "having similar charters," (19 Howard, 323,) then the power to buy and sell gold (the right to do both which is conferred by the same clause of the charter) may be inferred by the jury.

Again, if a Cashier is shown to have usually or frequently *pledged in writing the credit of the Bank* in the usual course of business, with the knowledge of the Bank, and such is shown to be the usage of other Banks, as before stated, it is evidence from which the jury may infer that he is authorized to pledge that credit in all transactions authorized by the charter and which could lawfully be confided to a Cashier.

It is not contended by Plaintiffs that a power to buy may be inferred from an exercise of a power to sell, however frequent that exercise may have been, nor that a power to endorse may be shown from numerous instances of signature as promissor. The contracts in such cases are wholly dissimilar; to use the words of Story's Agency, "they are acts distinct in their nature." But when the powers exercised are shown to be of the same character *involving both in form and substance the same identical obligation and the same consequence to the principal*, and in the course of his business it cannot be necessary to show that in their previous exercise they have been applied to contracts for the same article. (See 13 Pick., 291.

Turning now to the elementary treatises and the authorities that establish this view, they are as follows: —

Story's Agency, ed. 1863, p. 98, § 87, states that, "If the agency arises by implication from numerous acts done by the agent, with the tacit consent and acquiescence of the principal, it is deemed to be limited to *acts of the like nature.*" On p. 97, § 89, he illustrates what is meant by acts of the like nature, thus: "an authority to buy cannot properly be inferred from an authority to sell. *They are acts distinct in their nature.*"

Smith's Mercantile Law, ed. 1850, p. 151, says: "He who accredits another by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons *in the seeming* course of that employment and on the faith of that credit, whether the employer intended to authorize them or not.

American Leading Cases, ed. 1857, p. 573. "With regard to the limits of the general agency, which is created by a series of acts or course of dealing, the language of Lord Eldon's, in Davidson *vs.* Roberts, 3d Dow, 219, 229, has generally been considered as defining the principle with accuracy. In that case the position had been stated that an endorsement *per* procuration required a special mandate, but Lord Eldon's opinion was, that no such thing was absolutely necessary: "for if *from the general nature* of the acts permitted to be done, the law would infer an authority; the law would say that such an authority might exist without a special mandate."

The author goes on to say, "This is illustrated in Com. Bank of Erie *vs.* Norton, 1 Hill, 502."

In this case (Commercial Bank of Erie *vs.* Norton) Cowen, J., states the exact principle thus: "It is not necessary, in order to constitute a general agent, that he should have done before *an act the same in specie with that in question.* If he has usually done *things of the same general character and effect* with the assent of his principals, that will be enough." The doctrine thus stated was in that case applied where the agent of a firm, who with their knowledge and assent, was in the habit of drawing bills and making notes and endorsements for them, had made an acceptance, *but no proof was offered* that he *had ever previously made an acceptance.* The principal was charged. The case is cited as sound, in Parsons' Mercantile Law. p. 135, note, and Paley's Agency, ed. of 1856, p. 169, note.

In Watkins vs. *Vince*, 2 Starkie R., 368, Lord Ellenboro carried the doctrine so far as to hold that a son who had signed for his father in three or four instances and had accepted bills, could bind the father *by a guarantee.*

In Prescott vs. *Flinn*, 9 Bingham, 22, C. J. Tindall says, "It may be admitted that an authority to draw does not *import in itself* an authority to endorse bills, but still the evidence of such authority to draw *is not to be withheld from the jury, who are to determine on the whole evidence,* whether such authority to endorse exists or not."

VII.

The evidence to which these principles are to be applied, will be found to be as follows:—

1st. The cashier of Defendants was intrusted by them with powers so large and comprehensive in dealing with the funds of the Bank, giving its checks, pledging its credit, and making its contracts and purchases, that instead of these transactions going regularly as they

occurred through the books of the Bank, and being credited or debited to the accounts to which they severally belonged, *there was opened on the books of the Bank one general account with the Cashier*, in which all the debits (and of course the credits) arising out of them, were entered to his debt or credit.

Millett (book-keeper). Record, p. 44.

2d. These transactions, thus entered on the books, embraced, —

Giving checks in lieu of bills where discounts are made.
Giving checks for the purchase of exchange.
Giving checks for money *borrowed of other Banks.*

Millett, Record, p. 44.

3d. The amount of checks thus given *for exchange*, and in lieu of bank bills on discounts, *during the five months* prior to the transaction now under investigation, was *two millions five hundred thousand dollars*, and in addition, the amount of such checks given for money borrowed of other Banks during the same period, was one million five hundred and forty-seven thousand dollars.

Millett, Record, p. 44.

4th. Regular printed blank checks were kept by the Bank to facilitate these operations of their Cashier. (Millett, 45.)

Next. The evidence as to the powers openly and habitually exercised by the Cashiers of Banks in Boston, *in the dealings of such Banks with each other.*

Without encumbering the brief with an abstract of the testimony of each witness, it will be sufficient to state that, from the evidence derived from the officers of more than twenty Banks of Boston, in relation to the *dealings of such Banks with each other*, a usage is shown by which, without by-law or vote, powers are entrusted to Cashiers of such Banks to borrow and lend the money of their Banks of and to each, to buy and sell exchange of and to each other, and *in all such transactions to pledge the credit of their respective banks* — usually by Cashiers' check, sometimes by certificates or memoranda. That these transactions are frequent, involving large sums of money, and that they are uniformly conducted in faith of the implied powers of Cashiers, without inquiry.

Loud,	Record,	49	Sprague,	Record,	55
Tead,	"	68	Loring,	"	60
Dodd,	"	71	H. K. Frothingham,	"	63
A. T. Frothingham,	"	70	Drake,	"	64
Lane,	"	73	Wetherbee,	"	66
Conant,	"	74	Burnett,	"	67
Blasdale,	"	76	Blanchard,	"	58
F. L. Davis,	"	78	Gulliver,	"	59
Tyler,	"	81	Soren,	"	45
Benyon,	"	82	Hersey,	"	47
Haven,	"	11	Fuller,	"	30
G. H. Davis,	"	22	C. C. Hall,	"	48

In view of this evidence, we ask if it ought to be determined that there was no legal competent evidence proper to be submitted to a jury, from which they might infer *that, as among the wide powers openly exercised by Smith, the Defendants' cashier, in numerous instances and for large amounts, was the authority to purchase exchange, he had or not also entrusted to him the power to purchase gold*, and thus to find their verdict for the Plaintiffs upon the counts framed upon such purchase.

5th. To this view of the implied powers of Defendants' cashier, Plaintiffs desire to add, that it has been determined by the same Judge who delivered the opinion of this Court in U. S. Bank *vs.* Dunn, 6 Peters, 51, relied on by Defendants, that "the cashier of a Bank authorized by its charter to deal in bills of exchange, may accept such bills as the agent of the Bank. *This is in the scope of his agency*, and is sanctioned by universal usage."

La Fayette Bk *vs.* State Bk., Illinois, 4 McLean, 208.
See also Sturgess *vs.* Bk. of Circleville, 11 Ohio State Rep., 53.

VIII.

Plaintiffs next desire to submit to the Court, upon the foregoing evidence, the question whether it was not legally fit to be submitted to a jury to find that Defendants' cashier, clothed as he was with the powers stated in the proofs, had or not the *incidental power* to certify the checks declared on, and thus support the counts in the declaration framed on those checks.

The grounds of ruling set forth in the opinion of the Court below seem to be limited to this question alone.

1st. In discussing this point Plaintiffs assume, as claimed above, that there was evidence competent to be submitted to the jury to show the large powers entrusted to the Cashier to pledge the credit of the Bank, — that the jury might well find that he had power to make the purchase of gold from Plaintiffs declared on, and that he might have given a Cashier's check on his own Bank, a certificate of deposit or a credit for the purchase money.

Now it is submitted that the form of pledging the credit of the Bank at the moment the gold was received, viz.: by certifying the checks of the parties for whom the arrangement was made, is of the same character and nature as a Cashier's certificate of deposit, checks, or memorandums of credit, referred to in the testimony as to usage. Like these, it is an absolute and not a contingent promise to pay, and in view of the wide powers exercised by Defendants' cashier, the jury had a legal right to infer that this mode of pledging the credit of the Bank, suited as it was to the circumstances, (the Cashier having full authority to make the purchase,) was within his delegated powers.

IX.

But if, in the judgment of the Court, the power to certify these checks was not, under the evidence, legally fit to be submitted to the

jury, still the right to recover the purchase money for the gold, stands unaffected by the giving of those checks. They were received in the faith that in dealings of Bank with Bank, Defendants' cashier had authority to certify them. (Davis, p. 21; Fuller, p. 31.) Indeed, *as to the* $75,000 *check taken by Defendants' Cashier from Plaintiffs' Teller, in the absence of the Cashier, the check was taken without authority*, in faith of the occurrence a few hours previous, when such checks had been received by the Cashier.

But however these checks may have been received, they purported to be delivered to the Plaintiffs in payment for the gold. If they were void, no payment has been made. It is equivalent to a payment in forged bills. The debt remains.

Eagle Bank *vs.* Smith, 5 Conn., 71.
Puckford *vs.* Maxwell, 6 Term R., 52.
Young *vs.* Adams, 6 Mass., 182.

A suggestion was made at trial that Plaintiff was bound to elect whether to proceed on the counts founded on the checks or on those for the purchase money due for the gold, and further, that no recovery can be had on the latter counts while the checks remain in the hands of Plaintiffs. We submit that Plaintiff was not bound to elect (see Meserve *vs.* Norris, 3d, Cushing, 403.) That the checks may be delivered to plaintiff, or placed on file for his use, "at any time before final judgment."

Bridge *vs.* Batchelder, 9 Allen, 394.

X.

The two grounds on which Plaintiffs thus place their cause assume — the one that the power to purchase exchange and gold, the other that the power to certify checks in dealings *between Bank and Bank*, may be lawfully delegated to the Cashier. Both these positions are denied by Defendants, who assert that all *quasi* judicial powers, as they call them, are vested solely in Directors, and that no other than a mere ministerial duty can be entrusted to a cashier, so that in the daily if not hourly recurrence of purchases of exchange or gold, the adjustment of balances between Banks at the clearing-house, and giving checks for these balances, or obtaining temporary accommodation or checks to provide for these balances, and all similar arrangements disclosed in the evidence as being the uniform practice of these Defendants, and of all the other Banks in Boston, all are void, and there can be no other protection to the public except by first ascertaining if there be *a regular vote of the Board of Directors as to each separate transaction*, since upon Defendants' theory no general power can be granted to the Cashier. On this point Plaintiffs submit, —

1st. That Defendants' proposition is founded on the doctrine that if a charter *prescribes the mode in which the officers of the Company*

must act or contract, that mode must be strictly pursued, and the power cannot be delegated. (A. & Ames Corp., 8 Ed., 283. Lyon *vs.* Jerome, 26 Wend., 485.) But this doctrine has no application in this cause, since the National Currency Act prescribes neither the mode nor the officers by whom the acts, or contracts necessary to the course of business shall be made, but merely confines the general oversight and management to a Board of Directors.

2d. This precise question as to power of the Directors to authorize other officers of a Bank, by a general vote, to exercise in the name of the Bank, *at all times*, the power to borrow money and give notes, has been raised and carefully discussed in a case where the charter, in terms, provided "the affairs of the Company shall be conducted by the Directors," and the careful judgment of Chief Justice Tilghman, displaying, as it does, the practical difficulties which would arise from a denial of the power, seems conclusive.

Ridgway *vs.* Farmers Bank, 12 Sarg. & Rawl., 256–261; Angell & Ames Corp., 8 Ed., pp. 267–68.

(As to incidental powers of Banks to borrow money, see 14 Barbour, 358.)

3d. If the power to borrow money, at all times, for the purposes of the Bank, and give notes therefor, can be delegated by the Directors to the Cashier, surely the power to purchase exchange and gold, in pursuance of the charter, can be so delegated. Whether the power to delegate to a Cashier authority to certify checks exists, has nowhere been settled. As to conferring such authority *on tellers by usage*, the power is negatived in Massachusetts, (9 Met., 306,) while in New York it is settled that such power may be conferred, (16 New York, 125; 25 New York, 143; 2 Duer, 121; 4 Duer, 219,) and the Statute of the U. S., 1864, chap. 173, sect. 110, recognizes certified checks, and makes them in common with the circulation subject of taxation.

4th. Whether the control of the great leading business for which a Bank is created, viz., loans and discounts, can be delegated, may be doubted, (U. S. Bank *vs.* Dunn, 6 Peters, 56; Bk. Comrs. *vs.* Bk. of Buffalo, 6 Paige, 497.) The prevailing practice known and acted upon by the public, undoubtedly is to apply to a Board of Directors for discounts. But it by no means follows that the whole of the other functions of a Bank can only be performed by a vote of Directors, upon each hourly transaction, and the authorities cited above are repugnant to any such doctrine.

XI.

At the trial and argument below, two suggestions were made by Defendants, as grounds on which the case should be withdrawn from the jury, and decided by the Court, viz.:

(*a.*) That in view of the testimony as to the transaction by which the gold was delivered to Defendants' cashier, it was not and could not

be intended or legally held to be a sale or delivery of the gold by the Plaintiffs to the Defendants.

(*b.*) That as a matter of law the transaction by which Plaintiffs originally received the gold, under the arrangement with Mellen, Ward & Company, must be held to be a loan by Plaintiffs on a pledge of the gold, and that, considered as a loan, it violated the provisions of sect. 29 of the National Currency Act, and by reason thereof Plaintiffs cannot by law maintain a suit for the price of the gold under the sale to Defendants.

1st. The ground on which Defendants assert that the question, whether there was a sale of gold to Defendants, is not to be submitted to the jury, must be, that there was in legal contemplation no evidence of such sale, but that the Court must rule, as matter of law, that it was a sale and delivery to Mellen, Ward & Company.

Their view of the testimony is this. That the gold was originally delivered to Plaintiffs under a contract between them and Mellen, Ward & Company, and that all rights under that contract were, at the time, their rights and their property. That in the transaction under which the gold was delivered to Defendants' cashier, all that took place, including the price, took place under that contract, and that the payment for the delivery of the gold was by Mellen, Ward & Company's checks certified by Defendants.

This view of this evidence by Defendants assumes, for the purposes of the argument, that the contract of Plaintiffs with Mellen, Ward & Company was, as stated by Messrs. Haven, Davis, Fuller, (Record, pp. 9–27–28–19,) a contract to purchase the gold, with an agreement as to the right of Mellen, Ward & Company to repurchase it on the terms stated in the testimony. Now this right to repurchase was capable of being transferred to the Defendants. Indeed, the testimony shows that at the outset, it was agreed or contemplated that it would be so transferred "in the course of a few days, and that the gold, when taken away, would go *through, probably, some other Bank, mentioning, perhaps, the State Bank.*" (Haven Record, p. 9; Fuller Record, p. 27.) *Next.* The transfer of this right to the State Bank (within two days) was, in fact, accomplished in this manner. "Mr. Carter and the Cashier of the State National Bank, came to the Bank and came to my table. Mr. Carter said, we have come in for the gold. Mr. Smith, the Cashier of the State Bank, said, we have come in to get an amount of gold;" that *he would pay for it* by certifying the checks, when he saw the gold was all right. He certified them in the Bank, after the delivery and examination of the certificate, *and he — not Mellen, Ward & Company — handed Plaintiffs the checks* on receiving the gold. (Fuller Record, pp. 28–29.)

This then was a transfer to the State Bank of Mellen, Ward & Company's right to repurchase the gold, and an exercise of that right by their Cashier, after careful scrutiny. Nor does the fact that the attempted payment was by checks of Mellen, Ward & Company, certified by Defendants' cashier, at all negative the view that the State Bank were purchasers: the inference, without further evidence, would be strong

that they made precisely the same arrangement with Mellen, Ward & Company, as had been previously made with them by Plaintiffs (perhaps upon easier terms), as they agreed to pay Plaintiffs precisely what Plaintiffs had paid, viz.: 125 per cent. *The moment the Defendants got the gold they had funds in their hands, and the certified checks could be drawn against those funds*, and were drawn for the identical amount which Plaintiffs had agreed originally with Mellen, Ward & Company to pay.

But however all this might have appeared to a jury, surely it was a question to be submitted to them.

2d. As to Defendants other proposition, that the arrangement between Plaintiffs and Mellen, Ward & Company (notwithstanding the testimony of Haven & Fuller's, that it was designed as a purchase) must in law be held to be a loan, with a pledge of the gold as security, it is submitted, —

(*a.*) That there is not, so far as Plaintiffs are aware, any evidence of the amount of their capital stock upon which to rest the averments that if it were a loan, it exceeded the quantum permitted by the 29th section of the National Currency Act. There may be found in the Record evidence from which a jury might or might not derive the inference, but such inferences are for a jury and not for a Court.

(*b.*) *Next.* Certain features of the transaction are relied on by Defendants which, if there were no direct evidence of what the exact contract was, and that it was intended by both parties to be a purchase and not a loan, might support with more or less strength, the position that in law such features would constitute a loan. But the direct evidence of the terms of the contract negative entirely any inference which the jury might otherwise draw from these detached features. Surely in such a conflict the question is for the jury, with instructions as to what facts, if found by them, would in law constitute a loan, and what a purchase.

The direct evidence of the contract, and the whole contract, is this. "I stated to the Cashier that he could take the gold * * on the same terms that he had already taken gold from Mellen, Ward & Company. Mellen, Ward & Company had at times, during the preceding two or three months, brought gold into the Bank and received currency for it, at the rate of $125, taking the gold and paying for it, in fact purchasing the gold for the Bank for $125 in currency for $100 in gold, and that he could give them the right to come in at any time afterwards (being on demand on [of] the Bank), and take gold from the Bank, paying the Bank for the gold $125 in currency for every $100 in gold, and such premium or compensation as would be equivalent to the interest *on the amount invested by the Bank in gold since the time the Bank had purchased that gold. I told him never to take any obligation or memorandum or note of any kind, but to rely entirely on the purchase of the gold.*" (Haven Record, p. 9.) That this authority was literally executed by the Cashier, is shown by his testimony. (Fuller Record, p. 28; Davis, teller, Record, p. 19.)

(*c.*) But assume it to be true that the Court or a jury should arrive at the conclusion that the transaction in question was a loan accompanied by a pledge, can the State Bank avoid their contract to pay the agreed price of their purchase of the pledge from us, (*an agreement made with the assent of the pledgor*), on the ground that we received the pledge under a contract with the pledgor, which is illegal? Or can a party, who has accepted the draft of a pledgor given in settlement of a transaction which is an infraction of a statute, set up the illegality of that transaction to avoid his acceptance?

XII.

Before concluding this Brief, Plaintiffs desire again to refer to the evidence on the question whether the gold purchased of Plaintiffs is not shown to have been carried to Defendants' bank and placed with their funds.

We have already stated that no proof was offered by Defendants that it was not so, although the onus is on the Defts. 14 Bank. R. 358 11 C. B. Rep. 897

The proof that it was, rests on the following testimony as to the occurrences on the occasion of the demand made at Defendants' bank of its Cashier and of its Directors. It is as follows: "I said to him (Defendant's cashier) I thought you were coming in to pay the gold for these checks — to pay the money. — I did not say gold." The Cashier replied, "Yes, I am going out now to attend to it and get the money." "Get the money," said I, "didn't you have the money — the gold? were not the gold certificates delivered to you?" "Yes," said he, "*I had them here, but they are not here now.* * * * You hold the State Bank." (Haven, Record, p. 10.)

Again, at the interview of Mr. Haven with Defendants' Directors, when he stated to them he (the Cashier) has certified checks, and those checks were given to the Cashier of the Merchants Bank for gold delivered to him, the property of the Merchants Bank, and I wanted payment for that gold. There was no denial that the gold had not been received by the Bank, but merely a statement that they had not authorized their Cashier to certify checks. (Haven, Record, p. 10.)

S. BARTLETT,
J. G. ABBOTT,
For Plaintiffs.

Banklet - ment Bank - Sold to State Bk
#600.00 - certified chk - by cash
of State Bank - 89 Charter power of Bank

Supreme Court of the United States.

DECEMBER TERM, 1869.

THE MERCHANTS' NATIONAL BANK OF BOSTON

vs.

THE STATE NATIONAL BANK OF BOSTON.

PLAINTIFFS' SUPPLEMENTAL BRIEF.

The plaintiffs submit the following as supplemental to their brief first filed:

Upon the question of the liability of the defendants upon the certified checks, it is submitted, in addition to what has already been claimed, that, upon the evidence in the case, nothing having been offered to control it, the jury should have been instructed, as matter of law, that the defendants' cashier had authority to bind them by certifying the checks in suit.

We propose to discuss this question in the first instance without considering the evidence of the usage and course of business of the Boston banks, but entirely upon the other facts in the case. And, in the view we propose to take of the case, it will be found to be of no significance or importance that no usage has been proven to do this precise act.

The authority of the cashier to do the act in question is independent of usage; it is derived from his being cashier, an officer provided for by the law creating the bank, and exercising the functions of the artificial person, the bank, in its dealings with the public, about the business it was established to do. The same authority would exist on the like

evidence if we were dealing with the first and only bank established under the national banking act.

The evidence by which this authority of the cashier is proven is this:

1. The defendants are organized as a corporation under the act of Congress.

2. In establishing the corporation, it is provided in the articles of association that "its banking-house or office shall be located, and its operations of discount and deposit carried on, and its general business conducted, in Boston."

3. Having associated under the act, they hold themselves out to the world as a national bank, by furnishing a place of business and putting it under the control of an officer provided by law, viz, a cashier.

4. They do not by their articles of association, by their by-laws, by any act or notice whatever to the public who may deal with them, restrict the business they propose and offer to engage in, to one or more of the different kinds which a national bank is authorized to do. As far as the public are concerned, they hold themselves out as a banking association generally, with all the powers given by law, and fully authorized and ready to do all the business the law permits them to do.

5. By their articles of association *they provide for the election of a cashier and such other officers as may be necessary to transact their business.* They then choose a cashier, put him in their banking-house, and give him the control of their banking business with the public, by providing by their by-laws that he shall be responsible for their money, funds, and valuables; that he or the president shall sign all *their contracts, checks, drafts, receipts, &c., &c.*, the bank act providing that he shall also sign their bank notes. (Record, *addendum*, p. 224.)

6. The law provides that a bank may, by their directors, choose a cashier, exercise *all such incidental powers as shall be necessary to carry on the business of banking by discounting, by receiving deposits, by buying and selling exchange, coin, and bullion,* and also that the directors may make by-laws *to define and regulate the manner in which its general business shall be conducted.*

7. The defendants have not by their by-laws regulated the manner of doing their general business. They have made no provision as to when, how, to what amount, and by whom deposits should be received and paid out, or as to buying and selling exchange or coin and bullion. They only make the provision already quoted, that the cashier shall keep their money and valuables, and that he also shall sign their contracts, checks, drafts, &c.

Such being the evidence, the question to be discussed is, what authority has the cashier to bind the bank in his dealings with third persons? Can he certify a check drawn by a depositor against funds, so as to bind the bank to the payment of it to the holder?

We say, advisedly, the question is, can the cashier certify a check drawn against funds, so as to bind the bank; for although the defendants discuss at length the question whether the cashier can certify a check not drawn against funds, or whether such a contract is not beyond the power of the directors, the determination of that question against the authority in such a case would have no relevancy to or bearing upon the case at bar; because—

If it is decided that the cashier possesses the power to certify to a check drawn against funds, so as to bind the bank, clearly a *bona fide* holder can enforce such certificate, whether it is false or not, and the question of *bona fides* is one to be submitted to a jury.

And because there is in this case the fullest evidence to show that the checks were drawn against funds, and that the plaintiffs had not only no notice that they were not so drawn, but affirmatively the most controlling reasons for believing they were so drawn.

Therefore if the authority of the cashier to certify a check drawn against funds, so as to bind the bank, is established, it is quite sufficient for the purposes of this case.

In discussing the question thus raised, the first step to be taken is to ascertain if the contract is one that can be made by the corporation itself, because if it is *ultra vires*, of course that ends the whole matter.

That the contract can be made by the directors, acting for the bank, is hardly questioned by the defendants, and if it was more seriously denied, there could really be no doubt of the existence of their authority.

It is a contract proper and necessary in carrying on the business of banking, in fact one of its incidents,

That when a depositor has funds to the full amount of his check drawn on a bank, that the latter cannot bind themselves absolutely to pay that check to its holder, is a proposition the statement of which is its sufficient answer.

It is not assuming any greater obligation than before existed; it only changes the person by whom it may be enforced. From its character and the purposes it was made to meet, it is one of the very ends a bank was established to further, to enable money and credit to be easily and safely transferred from one to another in the transactions of commerce.

Indeed in no case has the power of a bank to certify a check ever been seriously questioned, and such instruments are recognized by the law providing for their taxation.

Stats. U. S., 1864, chap. 173, sec. 110.

The real, substantial question then is, whether upon the evidence the cashier can make this contract so as to bind the bank.

In the first place the objection made, that no persons but the directors can make a contract to bind the bank, that is, that there must be express authority from them by vote or under the by-laws, before any officer can enter into a contract binding the corporation, cannot be sustained.

If such a rule was adopted it would put an end to the transaction of any business with the banks, and they would be a clog and hindrance upon the doing of the very business they were established to advance, and bring all monied transactions with them to a stand-still.

From the nature and character of the organization of a bank and its board of directors the public who deal with them cannot come in contact in common ordinary banking

business and contracts with the directors. *The directors* may *direct* how business shall be done by the other officers, but it *is done* entirely, and it must necessarily be so, by the officers who are appointed to deal with customers.

The directors are not in perpetual session, so that, if they only could make contracts for the bank, it would be impossible to conduct a banking business requiring contracts to be made any moment of business hours.

Upon the claim made in this case the cashier could not have received a deposit so as to bind the bank, for there is no by-law or vote authorizing him so to do, but we suppose there could be no doubt that if he had received a deposit the first act he did after the bank was opened for the first time, by so doing he would have made a contract binding on the defendants.

If the defendants establish a bank and open a banking, house, with full authority to do a banking business, by receiving deposits, buying and selling exchange and coin, and put that house and their property in it under the control of a cashier, he has authority, as far as others are concerned, to contract with them on behalf of the bank in reference to any matter fairly within the scope of the business the bank was established to do, unless notice of a limitation of his power is brought home to those dealing with him.

The bank is established with power to receive deposits, to buy and sell exchange and coin; it is opened to the public with no notice that it will not do all the business the law impowers it to do; the very act of opening the bank without notice of limitation of the powers to be exercised is legally as efficient as would be a sign over their door designating themselves as dealers in deposits, exchange, and coin, for the very name "national bank" of itself includes all such business, unless its meaning is expressly limitated.

Therefore clearly, such a bank being established and opened to the public without notice of any limitation upon its business or powers, and a cashier being put in control with no notice of any limitation of his authority, the public have the full right to deal with him as with the bank upon all matters

the bank can deal in; the very fact of his being in the bank as chief officer, having control of the money and property, holds him out to others as the one to act for the bank in the business it was established to do, and as possessing authority to make contracts for the bank in the doing of that business.

Therefore if, under such circumstances, one should buy gold of the cashier or sell it to him, although it was the first buying or selling on the part of the cashier, the bank could not repudiate his authority so to act, nor could they escape the liability for money deposited with him, even if it was the first deposit received by him, and even if he should have put the money so received in his own pocket and not into the bank's drawers.

The reason in both cases, and in one as much as the other, for such a liability would be, that they held themselves out as buyers and sellers of exchange and gold and receivers of deposits, and put their cashier in control of the place where their business must be done, and the public have the right to deal with him in reference to all such business, whether as between himself and the corporation his power is limited or not, so that no notice is given of said limitation.

The case would be no stronger against one who should open a warehouse and put over its door "buyer and seller of cotton, wool, and silk," and put in it one to whom was committed the keeping of his property and apparently the control of the business to be transacted. Any person would clearly have the right to contract with such person in control for buying or selling wool, although up to that time there had in fact been no dealing except in cotton, and although, as between the principal and the agent, the latter was forbidden to deal in wool.

We claim, therefore, that it is clear beyond all peradventure, that upon the evidence in this case the defendants are estopped from denying that their cashier could make contracts binding upon them in refence to the doing of the business with others, they were made a corporation for the purpose of doing, and in reference to all things fairly incident to and within the scope of such business.

Taking it to be true, then, and it cannot successfully be denied, that upon the evidence in this case the defendants' cashier had full authority to take a deposit from a customer, to be drawn out by checks, so that the bank would be bound by his taking it. Such liability would depend upon no by-law of the corporation or vote of the directors, but upon the fact that their acts had estopped them to deny his authority to so bind the bank, and this would be so, although, in fact, the directors had forbidden him to receive deposits, if no notice of it was given to the public. Clearly, the cashier can make contracts to bind the bank without an express authority from a vote of the directors.

Taking it, then, as established that the cashier in this case had authority to receive a deposit for the bank, can he certify a check drawn against such deposit, so as to bind the corporation?

The answer to this question depends upon the nature and character of the contract of certifying a check, whether it is fairly an incident to the reception of the deposit, fairly within the scope of that part of the business of banking, consisting of receiving deposits to be paid out upon checks, or upon the production of the evidence of the deposit given for it.

If it shall be determined that certifying a check is fairly an incident to the power of receiving the deposit, that it is within the scope of the business of banking by receiving deposits, then clearly the cashier has the right to so certify and bind the bank.

What is the contract made by the cashier for the bank when he receives a deposit in the ordinary course of business?

It is this, clearly, that the bank will pay it out upon the depositor's checks to the holders of such checks, until it is exhausted, and if the bank refuses payment on any check drawn and presented, it is a breach of contract, for which an action will lie. This has been settled by undisputed authority.

Chitty on Bills, 280, 281.
Chitty on Cont., 18.

Whiteacre *vs.* Bank of England, (1 Compt., Mees & R., 741.)
Marzetti *vs.* Williams, (1 B. & Adol., 415.)
Robin *vs.* Stewart, (14 C. B., 606.)
In re Brown, (2 Story R., 502.)
Haskins *vs.* Anderson, (21 Wend., 379.)
Little *vs.* Phenix Bank, (2 Hill, 431.)

It has also been established by a series of authorities that, if one person puts money or other property into the hands of another, and in consideration thereof the person receiving promises to pay money to a third party, the third person can maintain an action to recover the money so promised to be paid, although there is no privity between himself and the person so promising.

Arnold *vs.* Lyman, 17 Mass., 404.
Hall *vs.* Marston, 17 Mass., 275.
Carnegiè *vs.* Morrison, 2 Met., 402.
Dutton *vs.* Poole, 1 T. Ray., 302.
22 Amer. Jur., 17.
2 Greenlf. on Ev., § 109.

And the same rule applies, although the promise is made to pay one to be designated at a future time by the person from whom the consideration moves, that is, a promise to pay to his order.

Weston *vs.* Barker, 12 Johns., 276.
Fenner *vs.* Meares, 2 Wm. Black., 1269.

Upon these authorities, and the universal usage of banks to pay checks drawn by their depositors, as long as the deposit lasts, and their implied contract so to pay, it has been holden that the holder of a check can maintain an action upon it in his own name, if on presentment the bank refuses payment while the deposit lasts.

Fogarties *vs.* The State Bank, 12 Rich. Law R., 587.
Vanbidden *vs.* The Bank, 14 La. Ann. R., 481, 482, 483.

Munn *vs.* Brick, 25 Ill. R., 35.
Insurance Company *vs.* Stanford, 28 Ill., 168.
Harris *vs.* Clark, 3 Const., 120.
Byles on Bills, (Sharswood's ed.,) 21 *n. n.*
In re Brown, 2 Story, 519.

Now, then, if the contract made by the bank through the cashier, when he receives a deposit, is that it will pay the deposit out on checks of the depositor, and that this liability can be enforced both by the depositor and the holder of the check, then it would seem perfectly plain that, if the cashier had the authority to make such a contract, he had authority to bind the bank to pay absolutely a check so drawn to the holder.

It in nowise increases or enlarges the liability of the bank. They have contracted to pay any check presented while the deposit is equal to the check. An action can be maintained for a refusal so to do. Does it not follow, as a necessary incident to the power to make such a contract, that there is power to declare the fact, so that the bank may be compelled absolutely to pay to the holder of the check.

The obligation to pay a check when presented is absolute so long as there is a fund to meet it. The cashier knows whether there is such a fund. He is called on to say what he knows, so that the drawer and the person who takes the check may have the benefit of such fact. Is it possible that he cannot bind the bank by the declaration of the fact?

It really operates like a new deposit, payable to the holder of the check. After such a certificate, the depositor has no claim to his deposit to the extent of such check, because the bank must pay the amount to the holder of the check on presentment.

In fact, it is but the reception of a deposit and the agreeing to pay it to the holder of the check, an obligation precisely similar to that arising from a certificate of deposit payable to the holder of the certificate on presentment.

A debt is due and owing to the depositor; at his request the cashier agrees to pay it to another; the debt remains the

same; the obligation to pay it the same in every respect; the person who is to receive it only is changed. Agreeing merely to pay a debt to a person other than the original creditor would seem to be within the power of the agent who had authority to contract it.

The legal effect of certifying a check is the same as that of giving a certificate of deposit, payable on presentment to order or bearer. The bank agrees to pay the holder of the check, on presentment, its amount. No possible difference in the legal obligation can be stated between a certified check and a certificate of deposit.

In all such cases the check is or should be charged to the drawer, and its amount holden to meet it on presentment. The drawer no longer can draw against the amount of the check, or claim it in any way. It is, in fact, one way of giving a party who has funds in the bank the benefit of a certificate of deposit, by which he is enabled to transfer the amount to others in the course of his business. If the drawer of the check had presented it and taken a certificate of deposit for the amount, payable to order or bearer, the liability of the bank would be in every respect the same as on the certified check, and there would be no more trouble in keeping the accounts of the bank in the one case than the other; for in both the check must be charged, and in both a new account opened with the holder of the certificate or check.

No case can be found where the authority of the cashier to receive a deposit and issue for it a certificate of deposit, payable on presentment to order or bearer, is denied or questioned. Indeed, it is one of the most common and usual methods resorted to by bankers and their customers in doing a banking business; so that it may well be said to be one recognized part of the business of banking.

Indeed, to state the claim that a cashier was authorized to receive deposits to be paid out on checks, and still could not receive one and give for it a contract agreeing to pay it to the holder on presentment, would seem to refute it. The obligation of the bank is not increased or enlarged by such a contract. On the contrary, if there is any differ-

ence, it is in favor of the bank, because in the one case the deposit may be drawn out in many different sums, and in the other there can be but one transaction in paying it.

If a certificate of deposit can be given by the cashier, for the same reason can he certify a check, for they are contracts as far as the bank is concerned, precisely the same, expressed only in different terms.

That such is the character of a certified check has been decided, after consideration, in the case of

The Girard Bank *vs.* Bank of Penn Township, 39 Pa., 98.

In that case it was held that the certified check was in fact a certificate of deposit, payable on presentment; that the statute of limitation did not begin to run against it till demanded; and that after the check was certified the drawer had no longer any claim upon his deposit to the amount of such check, and that the bank whose cashier had certified the check was liable when presented more than six years subsequently, although in the meantime the amount of it had been paid over to the drawer.

Indeed, when the proposition is established that a cashier, being put into a bank in charge of its property and business, has the right to take deposits because he is cashier, because the bank is created to receive deposits, and he is put in charge of it as the only person to conduct that business, the only person through whom the public can deal with the bank in making deposits, it would seem to follow that the cashier had the power, in receiving deposits as an incident to it, to contract in reference to the manner of payment, either by giving a certificate or certifying a check.

It is submitted, that if a customer has a deposit in a bank, draws his check, takes it to the bank, gets the cashier to state the fact that there are funds to meet it, so that he may have the benefit of the bank's credit in transferring it in his business, such certificate is an act most proper to be done in prosecuting the business of banking—is in fact a legitimate part of the very business itself.

Upon this part of the case, then, we claim that if a bank is organized under the act generally, with no restriction as to their power to do all the kinds of business authorized by law, a banking-house provided, and a cashier put in charge, with no notice of any restrictions upon his authority, he is not only the chief executive officer of the bank, but he is held out as empowered to transact on behalf of the bank all the ordinary business it is authorized to do; in fact, that he exercises the functions of the bank in dealing with the public in all the executive part of its business, and that his acts are the acts of the bank.

Therefore, when he receives a deposit and pays it out, the bank does it; when he agrees, as he does, to pay out the deposit on checks drawn against it, the bank agrees so to do, and if, having made such a contract, when a check is presented he puts in writing on the check what the bank has agreed to do instead of paying it, so that the holder may enforce it on presentment, such contract is the contract of the bank.

The cashier has agreed, in behalf of the bank, to pay a deposit to any third person who shall hold a check, and such agreement is the agreement of the bank. Cannot the same officer who is authorized to make it, at the request of the person with whom such contract is made, agree, so as to bind his principal, that the check shall be paid at all events when presented?

The power of the cashier to certify a check and bind the bank by so doing has been recognized in New York, Pennsylvania, Illinois, and nowhere denied. The case of Muzzy *vs.* The Eagle Bank, only applies to tellers, not by implication even denying the power to cashiers. In addition to the cases already cited, the following are added:

Rounds *vs.* Smith, 42 Ill., 245.
Bickford *vs.* First National Bank, 42 Ill., 238.
Brown *vs.* Leckie, 43 Ill., 497.
Barnet *vs.* Smith, 10 Foster, (N. H.,) 265.
Barnes *vs.* Ontario Bank, 19 N. Y., 166.
Carter *vs.* Leavitt, 15 N. Y., 269.

State Bank *vs.* Kaim, 1 Breese, 45.
State Bank *vs.* Locke, 4 Dev., N. C., 533.
Fay *vs.* Noble, 12 Cush., 1.

The evidence in reference to what was actually permitted to be done by the defendant's cashier and the same officers of other Boston banks is of great weight and significance in determining the extent of his authority in this case.

It is not necessary to show that the agent has done precisely the same acts as those the subject of inquiry, in order to establish his power to bind his principal. They must be of the same character, and in the prosecution of the same business.

For example, if a principal establishes a place of business for buying and selling different distinct articles of merchandise, and puts in it a person to take charge of his property there, who, without objection from his principal, buys and sells one or two kinds of the merchandise there kept, it certainly would be evidence from which an authority to buy and sell another kind might be inferred.

Apply the principle to this case. The defendants are authorized to engage in banking by buying and selling exchange, coin, and bullion, and receiving deposits. They permit their cashier, without objection, to buy and sell exchange, to borrow money to the extent of millions, and to pledge the credit of the bank by such acts, and also to pledge the credit of the bank by giving his checks instead of money for discounts. Such facts are strong if not conclusive evidence of his authority to buy and sell coin, or pledge the credit of the bank, in carrying on its ordinary business.

So in reference to the cashier's authority to certify a check. It is proven that he is permitted to borrow money for the bank, and pledge its credit for the loan; that he can give his checks instead of bills for discounts. Neither is an expressly granted power to the corporation, nor is either provided for in the articles of association or by-laws. Both are incidents of the business the bank is doing. Certainly such acts are controlling evidence to show that the cashier may pledge the

credit of the bank by certifying a check, in the course of the execution of a business the bank is expressly authorized to do, viz, receiving and paying out deposits, more especially as such act does not increase the debt of the corporation, only changes the person to whom it is payable.

Indeed the certifying a check may well be considered one means of borrowing money, at any rate an act of like character. The money for which the check is drawn is owing by the bank; it must be paid on presentment of a check. By certifying the check it is really borrowing that amount on demand, without interest, apparently for as great a length of time as loans are generally made by banks upon cashiers' checks.

The value of the usage and course of business of the cashiers of the defendants and other banks is this: that it shows authority on the part of that officer, in doing the ordinary common banking business of his principals, to buy and sell property and borrow money for them, and in so doing to pledge their credit. And this is evidence from which it may be inferred that the same power exists in doing all the business of the banks.

SIDNEY BARTLETT,
J. G. ABBOTT,
For the Plaintiffs.

Supreme Court of the United States.

DECEMBER TERM, 1869.

THE MERCHANTS NAT'L BANK OF BOSTON,

Plaintiffs in Error,

vs.

THE STATE NATIONAL BANK OF BOSTON.

BRIEF OF DEFENDANTS.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1870.

Supreme Court of the United States.

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THE MERCHANTS NATIONAL BANK OF BOSTON,

Plaintiffs in Error,

vs.

THE STATE NATIONAL BANK OF BOSTON.

BRIEF OF DEFENDANTS.

THE case of the plaintiffs proceeds upon three grounds: —

First. They rely upon the certified checks as the written contracts and promises of the defendants, made by their authorized agent, and binding upon the association.

Second. They aver that the defendants, through their authorized agent, by verbal contract, purchased of the plaintiffs gold certificates, and gold coin, and agreed to pay six hundred thousand dollars for the same.

Third. The plaintiffs say the defendants became possessed of certain gold certificates and gold coin of the plaintiffs, and ought to pay them the value thereof, to wit, the sum of six hundred thousand dollars.

That is to say, they count upon the written contracts, the oral contracts, and the implied assumpsit of the defendants.

As the written contracts, the certified checks, purport to have been made by the cashier of the defendant bank, and as the plaintiffs claim that the oral contract for the purchase of the gold was made by and through him, the main question in the case is, whether the cashier had authority to enter into such contracts, and to bind the defendants.

I. Had the cashier of the defendant bank authority to certify the checks of Mellen, Ward & Co., and by such certificates to bind the defendants to their payment?

This question resolves itself into two others: —

A. If it were in the power of the corporation or its directors to clothe the cashier with the authority to certify the checks in question, has it done so, either expressly or by implication of law?

Was it competent for the corporation or its directors to delegate such authority to the cashier so as to bind the corporation and its stockholders?

B. In examining the question of authority, it is well to keep in view, that plaintiffs do not aver that Mellen, Ward & Co. were depositors, or had funds in the defendant bank; that there is no proof that Mellen, Ward & Co. were in fact depositors, or had funds in the State Bank; that the plaintiffs were the payees of the checks, the first takers.

It is also well to observe the precise nature of the contracts, upon which the plaintiffs rely, to wit, that defendants' cashier, by putting the word "good" upon the checks, with his name and office, bound the defendants absolutely to pay the amounts to the holder; that hey are *not*, what are known as, certificates of deposit, to the credit of third persons, where the depositor pays the money into the bank, to the amount of the certificate; or, having before deposited, gives a check for the amount, which is immediately charged to the depositor's account.

II. It is clear, upon the record, that no *express* authority had been given to the cashier to certify checks.

A. No such power is conferred upon the cashier by the act of Congress under which the corporation is organized and from which it derives all its powers and functions.

Stat. of 1864, ch. 106; U. S. Stat. at large, vol. 13, pp. 99–118.

B. By the act of Congress, the entire control and management of the bank are vested in the directors.

With this view, both as to qualifications and responsibility, the office and trust of directors is most carefully guarded.

The directors, during their whole term of office, must be citizens of the United States. Sect. 9.

Three-fourths of them must have resided in the State one year preceding their election, and reside there during their continuance in office. Sect. 9.

Each director must be the owner of at least ten shares of the stock, and as such owner he is personally liable to twice their value. Sects. 9 and 12.

They are to be sworn to the diligent and honest administration of the affairs of the association. Sect. 9.

They are made personally liable for knowingly violating, or permitting any of the officers or agents of the association to violate, any of the provisions of the banking act. Sect. 55.

The officers of the bank are made criminally liable for various acts, when done without the authority of the directors. Sect. 55.

C. The intent and purpose of Congress to vest in the directors the powers and functions of the association, and to make them responsible for their use, could not have been more fully and clearly stated than in the 8th section of the banking act: —

Sect. 8. "*And be it further enacted*, That every association formed pursuant to the provisions of this act shall, from the date of the execution of its organization certificate, be a corporate body, but shall transact no business, except such as may be incidental to its organization and necessarily preliminary, until authorized by the comptroller of the currency to commence the business of banking. Such association shall have power to adopt a corporate seal, and shall have succession by the name designated in its organization certificate, for the period of twenty years from its organization, unless sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless the franchise shall be forfeited by a violation of this act; by such name it may make contracts, sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons; it may elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss said officers, or any of them, at pleasure, and appoint others to fill their places, and exercise under this act all such incidental

powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act; and its board of directors shall also have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and all the privileges granted by this act to associations organized under it, shall be exercised and enjoyed; and its usual business shall be transacted at an office or banking house located in the place specified in its organization certificate."

D. A comparison of the provisions of this section with the 11th section of the banking act of 1863, covering the same subject-matter, confirms, if confirmation were necessary, this view. In the act of 1863 it is the corporation which is to exercise the powers and functions of a bank; by the act of 1864, the association by and through its directors.

III. If, then, the cashier of the defendants was authorized to certify the checks sued upon, it was through the action of the directors, direct or indirect.

A. No such power is conferred upon the cashier by any by-law.

There has been no vote of the directors to confer such power upon the cashier.

No ratification or sanction by the directors as a board, or separately, of the use of such power by the cashier.

No evidence that the defendants' cashier ever in a single instance, before or since the acts in question, made any certificate upon any check of depositor or stranger.

How then, if at all, have the directors clothed the cashier with the power to make the contracts declared on?

B. They had the power to appoint a cashier and "define his duties" (*not to transfer or make over to him the duties and powers of the directors*), to point out, define what, he may or must do, not trenching upon but in just subordination to the powers and duties of the directors.

C. If, as plaintiffs in substance claim, the cashier may, by the appointment of the directors or their sanction and toleration, become the bank and exercise all its powers and discharge all its duties, the provisions of the act of Congress which have entrusted to the directors all these duties and functions, and held them responsible for their diligent and honest administration, are not merely a dead letter, but a snare.

IV. The directors having in fact appointed a cashier and defined some of his duties, and this of certifying checks not being one of them, there would seem to be but one of two grounds upon which it could be argued that the cashier had the power: —

First, that it was inherent in the office, so that when one was appointed cashier, he might *virtute officii* certify checks. Or, *secondly*, that the directors had held him out to the world as clothed with the power, — so held him out to the world that they would be estopped to deny it.

A. Though the power to define the duties of the cashier and other officers is vested by the act of Congress exclusively with the directors, it may well be conceded that the appointment and qualification of a cashier devolve upon him various powers and duties, and the inquiry is as to their nature and extent.

B. Speaking in general terms, his powers and duties are executive and ministerial, not discretionary or quasi judicial. His function is to carry into effect the contracts made by the directors, and to execute their orders. If in carrying into execution, the contracts and orders of the directors, his acts sometimes assume the form of contracts, they are ancillary and accessory, and not substantive and independent agreements.

Story on Agency, secs. 114 and 115.

Without assuming to state all the powers and duties of cashiers, which have been affirmed by the courts or rest upon the usages of different States or centres of business, some things, defendants submit, are plain.

C. It is plain that the appointment of cashier does not confer upon the appointee any power, duty, or function which the courts of law, and especially this court, have said do *not* appertain to the office. If, for

illustration, this court has said that a cashier *proprio vigore* cannot make a substantive contract for the bank and the plaintiffs rely upon a contract purporting to be made by the cashier, they must show affirmatively a delegation of the authority to make it.

D. And when, as in the case at bar, the control and management of the business of the corporation, the power to appoint all officers and define their duties, are vested in the directors, the plaintiffs must show, 1st, that the power conferred is within the scope of the corporate powers; 2d, that the directors have assumed to delegate it to the cashier; and 3d, that the power was in its nature capable of delegation, that it was executive and ministerial and not discretionary or quasi judicial.

V. This court has had frequent occasion to consider and pass upon the duties and functions of cashiers of banks. And Congress, in creating banks of the United States, and authorizing the appointment of cashiers, will be presumed to have had in view the functions and duties of cashiers as ascertained and settled by the courts of the United States.

A. At the least it may be assumed that the mere appointment of a cashier of a bank of the United States does not clothe him with substantive powers which the courts of the United States of the last resort have decided do *not* belong to the office.

The inquiry then is: —

B. What has been determined by the courts as to the powers and duties of cashiers?

C. In Minot *vs.* the Mechanics' Bank of Alexandria, 1 Peters, 46, it was held that no usage, even under the sanction of the board of directors, would justify a cashier in allowing customers to overdraw.

The case is authority for saying that even the express sanction of the directors would not have given validity to the acts of the defendants' cashier in the certifying of the checks sued on. The case at bar is not merely a case of overdrawing by a depositor, but a case of drawing to the amount of six hundred thousand dollars by a firm who were not depositors, and who had not and never had had funds in the bank.

D. In the case of the Bank of the United States *vs.* Dunn, 6 Peters, 51, this court held, that the president and cashier of a bank, acting to-

gether, had no power to bind the bank by a representation to an indorser where there was collateral security, that he would not be bound by his indorsement.

See, also, Bank of Metropolis *vs.* Jones, 8 Peters, 12.

E. The more recent and leading case in this court is that of the United States *vs.* the Bank of Columbus, 21 Howard, 356.

This case, defendants submit, recognizes and affirms as settled law, that the making of a contract involving the payment of money or the purchase or sale of property is not within the ordinary business of a cashier, and that if a party relies upon such contract by a cashier, he must show (at the least) a special delegation of power from the directors.

Having affirmed the doctrine laid down in the case of the United States *vs.* Dunn, *supra,* and in Fleckner *vs.* the Bank of the United States, 8 Wheaton, 338, that the acts of the cashier done in the ordinary course of business confided to such officer, are *prima facie* binding upon the bank, the court say, — "The term, ordinary business, with direct reference to the duties of cashiers of banks, occurs frequently in English cases, and in the reports of the decisions of our State courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary."

F. It is suggested that the contract in this case in the 21st of Howard was one the corporation itself could not make, was *ultra vires.* It is enough to say the case was neither argued nor decided on that ground. It was argued and decided on the power of a cashier to make the contract. The principles involved in the decision are therefore authority in the case at bar.

Not simply identity of facts, but of the principles involved in, and

which led to the judgment, measure the force and weight of a case as a precedent.

G. *See, also,* Park *vs.* Bell, 16 Queen's Bench, 290, and 12 Eng. L. & E. Rep. 389.

Hoyt *vs.* Thompson, 1 Selden, 321.
Bank Comrs. *vs.* Bank of Buffalo, 6 Paige, 497.
Lyon *vs.* Jerome, 26 Wendell, 561.
Wild *vs.* Bank Passammaquoddy, 3 Mason, 505.
Salem Bank *vs.* Gloucester Bank, 17 Mass. 1, pp. 28, 29, 30.
Mussey *vs.* Eagle Bank, 9 Met. 306.
Atlantic Bank *vs.* Merchants' Bank, 10 Gray, 532.
Franklin Bank *vs.* Steward, 37 Maine, 522.
Percy *vs.* Miladan, 3 Louisiana Rep. 561.

H. The leading case in Massachusetts, where the contracts sued on purport to have been made, is Mussey *vs.* the Eagle Bank, *supra.*

The case, though arising as to a check certified by a teller, in its reasonings and the principles affirmed, applies as well to those by a cashier.

The evidence tended to show that it was the usage of the teller during all the time of his holding office to certify checks; that his doing so was known to the bank, and not forbidden; that it was the usage of the tellers of other banks to do the same thing. The court held, that such evidence would not warrant the jury to infer that the power of so doing was an inherent power in his office; and that a usage for him to certify that a check was "good," so as to enable the holder to use it at his pleasure, was bad.

The court say, that "a power of certifying is, in fact, a power to pledge the credit of the bank to its customers; a power which, by the constitution of a bank, can alone be exercised by its president and directors, unless specially delegated by them; and consequently it cannot be implied as a resulting duty or authority in any individual officer."

Touching the matter of usage, they say: "But if a usage had been proved of the certifying, by the teller, that the check is good, to enable a holder to use it afterwards, at his pleasure, we are clearly of opinion that such a usage would be bad, and could not be upheld. It would give to bank checks, which are intended for immediate use, and are the substitutes

for specie, in the ordinary transactions of business, the character of bills of exchange, payable to the bearer, the bank being acceptor, and payable at an indefinite time. It would lead to loans to favored individuals, without the usual security; it would substitute checks for cash, in the hands of tellers who receive them, and would confer the power upon a single officer to pledge the credit of the bank by the mere writing of his name; a power never contemplated by the legislature, nor intended to be conferred by the stockholders."

"It has been pressed, in the argument on the subject of usage, that this certificate of 'good,' on the check, is but another form of the exercise of a usage, so common in banks, to grant by the teller a certificate of deposit of money to the credit of a third person. But we are of opinion with the judge before whom the trial was had, that usage of the one will not support the practice of the other. The two practices, while having the appearance of resemblance, and although one may be used for the same purpose as the other, in the form of a remittance, are, in their character, essentially distinct. A certificate of deposit is regularly issued only when money is actually paid into the bank, for the benefit of a third person, and is placed to his credit; by means of which certificate, and on the return thereof, he can draw for the money deposited; or, if the money is not actually deposited, but the check of the party procuring the certificate is given, such check is immediately charged to the account of the drawer. This is a transaction in which money is actually paid for the certificate; and the certificate is no more than entering the amount in the depositor's bank book. The difference is that the credit is given to the correspondent of the depositor, and not to the depositor himself."

I. The cases decided in the courts of New York do not really touch the question of authority, as they rest upon admissions in the pleadings or in agreed statement of facts that the usage was for cashiers to certify checks, or upon proof that such had been the practice of the defendants.

Nor did such question arise as to the certification by the teller in Willets *vs.* the Phœnix Bank, 2 Duer, 129; for the opinion shows that the plaintiff averred, and the answer admitted, that the certifying of the checks was the act of the defendant bank.

In the case of the Farmers' and Mechanics' Bank of Kent Co. *vs.* The

Butchers' and Drovers' Bank, 4 Duer, 219, no issue was made on the point of general authority. The question was as to a certification when the drawer had no funds, but the check had passed into the hands of a *bona fide* purchaser without notice.

Same *vs.* Same, 14 N. Y. 623.
Same *vs.* Same, 16 N. Y. 125.

In Claflin *vs.* Farmers' and Citizens' Bank, 25 N. Y. 293, it was admitted that the president who certified the check had general authority for that purpose; but the checks certified being his own checks were held to be void even in the hands of a *bona fide* holder.

J. These cases concern the effect and application of a local usage, whose validity was not put in issue, and therefore not passed upon. They have no tendency to show that the power to certify checks was inherent in the cashiers of banks in Massachusetts, existing under the laws of the State, or of the United States.

In case of the Girard Bank *vs.* the Bank of Penn. Township, 39 Penn. State R. 99, the court say, that checks marked "good" are to be regarded as evidence of deposit to the credit of the holder; but the question of authority to make the certificate was not made or passed upon by the court.

VI. If, then, the power to certify checks is not inherent in the office of cashier, if it has not been conferred upon him by the act of Congress, nor by the by-laws of the corporation, nor by the vote of the directors, nor by the written or oral license of the directors, nor by their ratification or sanction, express or implied, nor by the practice of the cashier himself, nor even by a single act of certifying a check for depositor or non-depositor, where there were funds, or where there were not, prior to the acts in question, from what evidence is the authority of the cashier to be inferred?

A. The plaintiffs have put into the case the 17th article of the by-laws of the defendants, which provides that "all contracts, checks, drafts, receipts, etc., shall be signed either by the cashier, or by the president, and all indorsements necessary to be made by the bank shall be under the hand of the cashier or president; and in case of the temporary

absence of both of these officers, the directors shall appoint one of their number to perform such duty during such absence."

The bank is a corporation whose contracts in writing must be signed by some natural person. The cashier is the recording and ministerial officer, and properly designated as the person to sign.

B. If the power to sign contracts could be construed as a general power to enter into and make contracts, the by-law would clearly be void; no by-law could be valid which divested the directors of the substantial control of the bank (the power to make its contracts), and which transferred it not merely to the cashier, but, in his absence, to a single director.

C. By comparing art. 17 with art. 13 of the by-laws, it is made plain that the directors had no such purpose. The 13th article provides, that "there shall be a standing committee of three appointed annually by the directors, whose duty it shall be to advise and consult with the president as to the discount and purchase of bills, notes, drafts and acceptances, and other evidences of debt, during the interval between the meetings of the board; and the president shall make report of the doings of himself and the committee at each regular meeting of the directors."

D. The duty of signing contracts is simply ministerial and executive and not discretionary; the cashier is to sign such contracts as the corporation, through its directors, makes. The power to sign, without more, excludes the idea of a power to make.

E. The contracts to be signed are the contracts of the bank. The checks to be signed are the checks of the bank and not of third persons.

Fearn *vs.* Filica, 3 Man. & Gran. 513.

F. The drawer of the check is the debtor to the payee. It is *his* contract, he standing to the payee as the maker of a promissory note, or acceptor of a bill of exchange. The check does not contemplate or require acceptance, and, in the usual course, is not accepted.

Thomson on Bills, 409.

Mulleck *vs.* Radakissen, 9 Moore, P. C. 69.

G. Smith put his name upon contracts made by Mellen, Ward & Com-

pany, which had their existence as contracts when signed by Mellen, Ward & Company. They were in no sense contracts made by the directors, or which had been prepared by them for signature by the cashier.

VII. But does not the production of a contract signed by the cashier furnish *prima facie* evidence that the contract was made by the proper authority?

Defendants say, clearly not.

A. It is to be observed, that the plaintiffs do not count upon contracts made by the directors and signed by the cashier, but upon contracts made by the cashier as the lawful agent of the bank;

That Smith did not profess to sign a contract previously made, but by his certificate or written declaration to enter into a contract;

That there is nothing in the signature itself to indicate that he is acting for the directors; no averment or recital that he is signing a contract made by others;

That though such presumption may attach to payments made or received by the cashier over the counter of the bank, or other acts within the scope of his ordinary business and duties, it is limited to them;

That upon the evidence, the contracts, if made at all, were made by the cashier while absent from the office and banking-house of the corporation fixed by its organization certificate. Stat. 1864, Sect. 8;

B. The attempted distinction between the *prima facie* and final effect of the signature to contracts would furnish no protection to the bank or its stockholders as in the hands of purchasers without notice it would be conclusive, and thus the whole power of the bank be put into the cashier's hands.

If the Bank of Vergennes *vs.* Warren, 7 Hill, 91, sustains such a distinction, it is certainly in conflict with the cases in this court.

C. But further than this, no rule of law is better settled than that a party contracting with a corporation of limited and defined powers, or the servant or agent of such corporation of limited agency, is always put upon his inquiry as to the extent of the power of both principal and agent.

See, among other cases,

Lowell Savings Bank *vs.* Winchester, 8 Allen, 109.
Zabriskie *vs.* Cleveland, 23 How. 398.
Pearce *vs.* Madison, 21 How. 443.
Salem Bank *vs.* Gloucester Bank, 17 Mass. 1.

D. In this last case the court say, "the directors are the agents of the company; the officers are its servants. The duties of both are pointed out by statute, or prescribed in the by-laws, which are the promulgated will of the company. *Acting within the limits of the authority thus given*, the company is liable for their acts; but beyond those limits they cannot bind their principals. Surely the promise of a cashier, made without authority, to pay a sum of money, for which the company had received no compensation, could not bind them; nor could the directors create such a liability. In such cases the person dealing with the officers of a bank must be presumed to know the extent of their authority. If they promise more than they are authorized, they may be personally answerable, but cannot pledge their principals." Pp. 28, 29.

E. The distinction between natural and political persons in this regard is obvious. A natural person may appoint an agent to do what he may do himself.

Not so with corporations. They can exercise no powers not delegated, and must use them in the mode prescribed by their charter.

F. He who relies upon a contract as binding upon a corporation, when such contract can be made only by its directors, must show affirmatively not only that the directors made it, but that it is within the scope of their powers and duties.

Burnes *vs.* Pennell, 2 H. of L. cases, 520, 521, 522.

G. A like rule of agency applies even to natural persons.

Under certain circumstances an authority arises to an agent to do a certain act, you must show the occurrence of the circumstances before you can count upon his act.

miliar illustrations will occur to the court.

master of a ship may give a bottomry bond under certain cir-
ances; the lender must show the circumstances.

Master may sell in case of necessity; the purchaser must show the necessity.

The master may give bill of lading for goods put on board; the holder must show that the goods were on board.

When the agent is requested to take the advice of a third person, or when it is prescribed that the act shall only be done with the consent of a third person, such advice must be taken, or consent had to authorize the agent to do the act.

So a power to draw and indorse bills for and in the name of the principal will not authorize a drawing or indorsing in his name for the accommodation of third persons.

1 Am. Leading Cases, 549.

See 1 Livermore on Agency, 104.

VIII. If, then, the signature of the cashier to the contracts does not show *prima facie* that the directors made them; if the by-laws confer no such power upon the cashier; if such power is not inherent in his office, — the plaintiffs must show upon the evidence that the directors in fact empowered the cashier to make them or held him out to the world as clothed with such authority.

A. With this view the plaintiffs claim that the defendants, by putting a cashier into the bank, and not defining or restricting his powers, held him out to the world as the organ of the bank for doing the business of banking, and that therefore any acts done by him in carrying on the business of banking, as receiving deposits, or buying and selling gold, are at least *prima facie* valid.

B. The obvious and conclusive answer to this position is, that the directors have done no such thing; they put the cashier into their bank as *cashier*, they held him out as *cashier*, and nothing more. The appointment to the office of cashier was a limitation of his powers. 21 How. 367

C. At the time that Smith was put into the bank as cashier, the co poration had been organized by the choice of directors, and in those di tors the power to carry on the business of banking had by law been ve Whosoever dealt with the bank was bound to know the law especially a bank organized under the same laws, and doing bu at its side.

D. It is simple assumption, therefore, to say that the defendant bank held out the cashier as its organ to do the entire business of banking. *It put the president, directors, cashier and other officers into the bank to do each his appropriate work.*

E. There is no analogy between the case of the defendants and that of a private banker putting behind his counter an agent to transact his business. The defendants neither did or could hold themselves out except as a banking association organized under the act of Congress, with the powers given by and to be exercised in the manner prescribed by that act.

F. As plainly as if it had been printed in broad letters upon its door-posts, defendant said, — "This bank is organized and opened for business under the act of Congress of June 3, 1864. Contracts with the bank must be made with the directors."

IX. That the putting a cashier behind the counter of a bank gives him no power to bind the bank by representing that he has power to do what he cannot lawfully do is too plain for argument.

A. There could, it is obvious, be no effectual definition or restriction of the powers of an agent if his representation of what he is authorized to do is to bind the principal.

B. Though as to statements of facts on matters falling clearly within the agents' sphere of power and duty, he may bind the principal, that is the outside limit.

C. If, then, the plaintiffs would claim that defendants are bound by the act of the cashier in certifying the checks, something more is necessary to be shown than putting him into the bank as cashier, and a failure to define all his duties.

D. If the power to make these contracts was not inherent in the office of cashier, and the directors have not defined or pointed it out as one of his functions, it could not spring out of their silence. It was not necessary for the directors to negative its existence, because there was neither law nor usage to require it.

X. If, then, there had been no express or intentional delegation of authority, had the directors so conducted themselves as to their cashier and third persons as to warrant them in believing that the cashier had been so authorized.

Master may sell in case of necessity; the purchaser must show the necessity.

The master may give bill of lading for goods put on board; the holder must show that the goods were on board.

When the agent is requested to take the advice of a third person, or when it is prescribed that the act shall only be done with the consent of a third person, such advice must be taken, or consent had to authorize the agent to do the act.

So a power to draw and indorse bills for and in the name of the principal will not authorize a drawing or indorsing in his name for the accommodation of third persons.

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See 1 Livermore on Agency, 104.

VIII. If, then, the signature of the cashier to the contracts does not show *prima facie* that the directors made them; if the by-laws confer no such power upon the cashier; if such power is not inherent in his office, — the plaintiffs must show upon the evidence that the directors in fact empowered the cashier to make them or held him out to the world as clothed with such authority.

A. With this view the plaintiffs claim that the defendants, by putting a cashier into the bank, and not defining or restricting his powers, held him out to the world as the organ of the bank for doing the business of banking, and that therefore any acts done by him in carrying on the business of banking, as receiving deposits, or buying and selling gold, are at least *prima facie* valid.

B. The obvious and conclusive answer to this position is, that the directors have done no such thing; they put the cashier into their bank as *cashier*, they held him out as *cashier*, and nothing more. The appointment to the office of cashier was a limitation of his powers. 21 How. 367

C. At the time that Smith was put into the bank as cashier, the co poration had been organized by the choice of directors, and in those di tors the power to carry on the business of banking had by law been ve Whosoever dealt with the bank was bound to know the law especially a bank organized under the same laws, and doing bu at its side.

D. It is simple assumption, therefore, to say that the defendant bank held out the cashier as its organ to do the entire business of banking. *It put the president, directors, cashier and other officers into the bank to do each his appropriate work.*

E. There is no analogy between the case of the defendants and that of a private banker putting behind his counter an agent to transact his business. The defendants neither did or could hold themselves out except as a banking association organized under the act of Congress, with the powers given by and to be exercised in the manner prescribed by that act.

F. As plainly as if it had been printed in broad letters upon its door-posts, defendant said, — "This bank is organized and opened for business under the act of Congress of June 3, 1864. Contracts with the bank must be made with the directors."

IX. That the putting a cashier behind the counter of a bank gives him no power to bind the bank by representing that he has power to do what he cannot lawfully do is too plain for argument.

A. There could, it is obvious, be no effectual definition or restriction of the powers of an agent if his representation of what he is authorized to do is to bind the principal.

B. Though as to statements of facts on matters falling clearly within the agents' sphere of power and duty, he may bind the principal, that is the outside limit.

C. If, then, the plaintiffs would claim that defendants are bound by the act of the cashier in certifying the checks, something more is necessary to be shown than putting him into the bank as cashier, and a failure to define all his duties.

D. If the power to make these contracts was not inherent in the office of cashier, and the directors have not defined or pointed it out as one of his functions, it could not spring out of their silence. It was not necessary for the directors to negative its existence, because there was neither law nor usage to require it.

X. If, then, there had been no express or intentional delegation of authority, had the directors so conducted themselves as to their cashier and third persons as to warrant them in believing that the cashier had been so authorized.

A. They had not acquiesced in the use of the specific power, for there is no evidence that the cashier ever certified a check before or since.

B. The plaintiffs' evidence is offered to show that defendants' cashier had been permitted to make contracts pledging the credit of the bank, and that it was the usage or course of business for cashiers in Boston to make such contracts; from the existence of a power to make the class of contracts testified of, they would have the court (or jury) to infer a power to make the contracts sued upon.

C. So far as the evidence concerns the conduct of the defendant bank and its relations with its cashier, it tends to show that the cashier had, before these transactions, been accustomed to borrow money of other banks to make up deficiencies at the Clearing House, and give his check therefor; to lend money for the same purpose, and receive a cashier's check therefor; to sell exchange on New York, and to draw on the bank's correspondent for the same; to buy exchange on New York, and give a cashier's check for the same; and (when discounts had been made) to give checks in lieu of bills to customers of the bank. Pp. 44, 45.

D. None of these acts, if proved to have been done by the cashier of his own motion, would have any tendency to show or warrant the jury in finding, that Smith had authority to go to plaintiffs' bank and certify checks of Mellen, Ward & Co., given to the plaintiffs in payment of a previous loan to them, or in payment for gold which the plaintiffs were under contract to sell to them.

E. But defendants submit that there is nothing in this part of the plaintiffs' evidence to warrant the conclusion that in any of these transactions the cashier of the defendant bank acted *mero motu* without the direction of the president and directors.

F. No force can be given to these acts of the cashier, unless it appears that they were done either under a general authority given him by the directors, or of his own motion and sanctioned by the directors. If done with the advice or with the consent of the directors or president at the time, they have no weight or significance.

G. Mr. Loud, the plaintiffs' cashier, says (p. 49), applications for loans at the Second National Bank were made by the cashier of the State Bank, and that the transactions were with the cashier. But it does not

appear that in any one of these transactions the defendants' cashier was acting of his own motion, or had not at the time the order or assent of the president or directors.

H. The force of this part of the plaintiffs' testimony, if it have force, is that the defendants' cashier borrowed and lent money, and bought and sold New York exchange *as cashier merely*, and without direction from or consultation with, the president and directors; and that if he might do these acts on his own authority, he might certify checks, or buy and sell gold on his own authority. Any possible analogy or inference fails unless it clearly appears that the first class of acts was done on his own authority merely.

I. It is very clear that no toleration or acquiescence on the part of the directors could confer any greater power upon the cashier than an express vote, or by-law for the purpose. Suppose, then, a vote had been passed by the directors, authorizing the cashier at his discretion to borrow money of other banks to meet balances at the Clearing House, and give his checks therefor, or at his discretion to buy and sell New York exchange; might the customers of the bank infer from such votes, even if valid, the power of the cashier to accept drafts or certify checks, — in other words, to use other and distinct powers for other and distinct purposes?

XI. But assuming that the borrowing money of other banks, dealing in New York exchange, and giving checks to customers in lieu of bills when bills were scarce, were done by the cashier, and so done, that is with such knowledge and acquiescence on the part of the directors, as to bind the defendant, they have no tendency to show the defendants' cashier had authority to certify checks or buy and sell gold.

A. The calling of the cashiers of twenty-two banks to prove the borrowing of other banks and giving checks therefor, and the purchase and sale of New York exchange, and the absence of evidence of the certifying of a single check by a cashier, is the most forcible of negatives pregnant. It shows not merely that there is no evidence in the case, but none to be had.

B. On this question of certifying checks, the only evidence is the statement of the president of the defendant bank, that they, the directors, had *not* authorized their cashier to certify checks; (Rec. p. 10); except

that one of cashiers, Mr. A. T. Frothingham, says he never certified checks, p. 71.

The evidence to show that cashiers did borrow money and give checks therefor, and did buy and sell New York exchange, and the absence of proof of a single act of certifying a check or of buying and selling gold, marks broadly, as matter of principle and of practice, the distinction between them.

C. So far as the evidence tends to show an usage or course of business, it clearly marks and defines it, and the line of demarcation falls entirely outside of the class of acts counted upon by the plaintiff.

D. But the claim of plaintiffs, as defendant understands it, is that the classes of acts shown to have been done by the defendants' cashier, and the acts sued upon, though not alike in form, are alike in principle in this regard, that they both pledge the credit of the principal.

E. Seemingly there are few agencies, general or limited, which do not more or less concern and involve the credit of the principal; but the suggestion is new to defendants that a power to pledge the credit of the principal for one purpose has any tendency to show the power to pledge it for another and distinct purpose.

F. If A authorizes B, expressly or by implication of law, to buy cotton on time, and he buys wool, or even real estate, all these acts assume to pledge the credit of A, but only the first does pledge it.

Or suppose A authorizes B to borrow money and give his, A's, note therefor, can it be seriously claimed that B might in A's name guaranty the notes of third persons, or buy gold or other merchandise for A?

G. The law does not extend or expand the powers of agents by analogy. On no subject are its rules of limitation more rigid. For examples: "A mandate to draw bills is held not a mandate to indorse. Authority to sign bills belonging to a specified class, — the principal will not be bound if the agent sign bills not belonging to that class. Authority to sign bills for a certain purpose, — the principal not bound if the agent sign for other purposes. An authority to accept for an individual does not authorize to accept for a company of which the individual is a member. Authority to sign in the course of a particular business does not authorize the agent to sign bills either for his own accommodation or for that of another."

Thomson on Bills, 152, 153; Ed. of 1865.

Davidson *vs.* Stanley, 2 Man. & Gran. 721.
Murray *vs.* East India Co., 5 Bar'n & Adol. 204.

H. The case of Com. Bank of Lake Erie *vs.* Norton & Hill, N. Y., 502, is not in conflict. The person accepting the bill was the general agent of the defendant, in the habit of drawing bills and making notes for his principal; and the difference there was one of form and not of substance.

I. Defendants submit, therefore, that the plaintiffs' evidence, so far as it tends to show the authority of the defendants' cashier, by permission of defendants' directors or otherwise, to pledge the credit of the bank, is limited and confined to certain distinct, well-defined classes of acts; giving no support or countenance to the acts upon which the plaintiffs rely in this suit.

XII. We pass to what constitutes the principal part of the evidence of the plaintiffs, the testimony of the cashiers of banks in Boston, as to the powers exercised by those cashiers.

A. Defendants objected, and still object to this evidence as incompetant and immaterial; that plaintiff could not and cannot show that the defendant bank had conferred a substantive power upon their cashier, by showing that cashiers of other banks used such power; *a fortiori* by showing that cashiers of other banks used powers entirely distinct from the one relied upon.

B. If the object of this testimony is to show an established usage in Boston as to what powers and duties belong to a cashier, it falls very far short of its purpose.

C. No usage, having the characteristics, the law requires, of "ancient, reasonable, certain and well known," could have grown up as to national banking institutions created by statute with clearly defined powers and duties; which at the time of these transactions had been in operation but about two years; sought to be engrafted upon a statute passed three years before; by the practice of institutions no older than the defendant institutions; and which being liable at any moment to be made depositories of the public moneys and financial agents of the government (Stat. of 1864, sect. 45), the security of their funds is jealously guarded at every point, and especially by vesting the power and control in the directors, and making them responsible for their faithful use.

Of such an institution to affirm that by an usage, (if proved) of two years life, you may show that the whole discretionary power of its statute trustees has passed into the hands of a subordinate officer, that in substance and effect the cashier has become the bank, is to give to usage the power of repealing solemn statutes.

D. Usage can never be resorted to to vest in an agent a power the law has not conferred. See the two well considered cases in Massachusetts of

Dickinson *vs.* Gray, 7 Allen, 39.
Dodd *vs.* Farnell, 11 Allen, 426.

E. Usage in any technical or legal sense is out of the question.

Bowling *vs.* Hamton, 6 How. 259; United States *vs.* Buchanan, 8 How. 102, 103.
Adams *vs.* Otterback, 15 How. 539.
Thompson *vs.* Riggs, 5 Wal. 663.

XIII. The evidence is introduced to show not technical usage, but that, according to the *ordinary course of business* in Boston, cashiers of banks take upon themselves to do certain acts, without first getting authority from the president or directors.

A. Assuming, for the argument's sake, that the directors of other banks have tolerated or sanctioned the doing of the acts in evidence by their cashiers, it is not easy to see how such toleration or sanction can affect the defendant, acting under an act of Congress which empowers its own directors to appoint a cashier and define his duties.

B. In appointing a cashier, they charged him with the powers and duties which the law had declared to be inherent in the office of cashier; as to *modes* and *forms* of business, they authorized him to follow the usage and custom of the city of the bank's location, so far as they did not conflict with positive law. But these were the outside limits.

C. The claim of the plaintiffs is far broader, that the action of other banks conferred upon the defendants' cashier a substantive power which his own directors had never conferred, and that it was the duty of the defendants to ascertain, at their peril, just what acts were permitted or tolerated in the cashiers of other banks, and to prohibit the doing of them by their own cashier, or else be bound by them.

D. Defendant submits that the defendants' directors might repose

safely in the provisions of law which vest the powers of the bank in its own directors, and authorize them to define the duties of their officers, and might fairly assume that the substantive powers, the discretionary and quasi judicial powers, could not be transferred to and vested in the cashier, if at all, except by some positive act or toleration, at least, of their own.

E. Defendant submits that the testimony as to the action of other cashiers in making contracts and pledging the credit of their respective banks is wholly incompetent to affect the defendants; that its directors had no power to control such action, and cannot be bound by it.

F. But the evidence, if competent to affect the defendants, not only falls entirely short of the point proposed, but may be fairly said to negative the point proposed, to exclude the conclusion sought to be reached by the plaintiffs.

G. The point sought to be established was, that the defendants' cashier had authority to certify checks and to buy gold.

They have put in evidence the acts of the defendants' cashier and the course of business of twenty-two other cashiers, and yet have not shown the use of either of the powers by any one cashier, in any one instance. If they have testified nothing of such usage, the just conclusion is because they knew nothing, and that the usage was for cashiers to abstain from doing either of those acts.

H. But the evidence as to what is done by cashiers in borrowing money of other banks, and buying and selling New York exchange, when carefully examined, falls far short of showing any established course of business, even as to the matters to which it relates.

I. It comes to little more than this, that the cashiers of neighboring banks have personal trust and confidence in each other, and when a cashier applies for a loan make no question as to his authority.

J. It certainly is not shown to be the uniform understanding that a cashier when borrowing money of another acts upon his own authority.

Mr. Haven, the president of the plaintiff bank, says the presidents have the controlling power, and can stop the cashiers if they like. Pp. 11.and 12.

Mr. Sprague says the transactions of borrowing money and selling exchange were, as a general thing, with the cashier, but variable. P. 56.

Mr. Frothingham, p. 63, says the checks for New York funds are made by the president when present; when he is absent, by the cashier.

Mr. Hall says, that in some banks the president is the managing officer, in others the cashier. In his (the Boston National Bank), the cashier is made the managing officer by the by-laws, p. 48; and that banks never receive checks of third persons in payment of loans. P. 49.

Mr. Soren says, that transactions as to borrowing money are sometimes with the president, if he happens to be in, but generally with the cashier. P. 46.

Nor is there shown to have been an uniform course of business, of giving a cashier's check merely for money borrowed. In nine or ten of the banks, whose cashiers were examined, checks were made payable to the teller and indorsed by him.

XIV. Upon this evidence defendants submit, there is no usage or course of business shown among the banks in Boston which would sanction or tolerate the acts of defendants' cashier, upon which the plaintiff relies.

A. There is no usage, practice, or course of business, general or limited, for cashiers of banks to certify checks or buy gold of their own motion, and without the order or request of the president and directors.

B. The course of dealing of cashiers of other banks, if it can be made to reach the defendant bank and modify its rights or invest its cashier with other powers than those conferred by his own directors, certainly must be limited to the class of acts covered by that course of dealing.

C. But to say that because cashiers of debtor banks borrow money of creditor banks at the clearing house to make up their balances or buy or sell exchange on New York, therefore the cashier of the defendant bank could by certifying checks pledge the credit of the bank without limit, for persons who were not depositors at the bank, who had no funds there, lending in effect not merely more than a tenth, but nearly one-third of the bank's capital (Stat. of 1864, sect. 29), by acts done outside of the banking house or office where its business was by law to be transacted, without the knowledge of the directors, or any one of

them, or of any other officer of the bank, without any consideration to the bank for the responsibility assumed, paid or promised, is not merely to make the cashier the bank, but to take the bottom out of the bank itself.

D. The practice to permit customers to overdraw, which this court said, in Minor *vs.* the Bank of Alexandria *(ubi supra)*, no consent or sanction of the directors could make valid, was far less vicious than this, which includes not only customers and depositors of the bank, but those not customers or depositors, and permits them not merely to overdraw, but to draw against nothing; to draw where the relation of bank and customer, debtor and creditor, never existed.

XV. In this regard the power claimed for defendants' cashier differs vitally from the cases cited and relied upon by the plaintiff, that the cases cited relate to the dealings of the cashier with the depositors and customers of the bank; this case would extend the power to the checks of strangers.

A. Mellen, Ward & Co. not being depositors, having no account with the bank, had no right to draw a check upon the defendants, and the cashier of the defendants had no power to receive or recognize it. Paying the check of a depositor to the extent of his deposit is but paying as the bank has agreed to pay. The paying of the check of a non-depositor, or guaranteeing its payment, is doing just what the bank had never agreed to do.

B. Under the U. S. Banking Act, it is the directors who are to determine whether the relation of depositor shall be established (sect. 8); and if the certifying of checks is to be an incident of receiving deposits, it is one which they must engraft upon it.

XVI. Nor does it follow because the cashier might pay or guaranty the payment of a check where there were funds, he could do it where there were not.

Farmers' & Mechanics' Bank *vs.* Butchers' & Drovers' Bank, 16 N. Y. 125.

Schooner Freeman *vs.* Buckingham, 18 How. 182.

Lowell Savings Bank *vs.* Winchester, 8 Allen, 109.

Grant *vs.* Norway, 10 Com. Bench, 665.

A. There is not only no evidence that Mellen, Ward & Co. had in fact any funds in the defendant bank, but there is no evidence of any purpose, agreement or understanding of Mellen, Ward & Co. and defendants' cashier to place the gold coin or gold certificates in the defendant bank.

Mr. Haven, indeed, testifies that at noon on the 1st of March, in the defendant bank, he asked the defendants' cashier "if he did not have the money, if the gold certificates were not delivered to him;" that Mr. Smith said, "yes, I had them here, but they are not here now." P. 11.

Giving full force to this testimony, it is, that Smith had the certificates with him in the bank, not that they were ever mingled with the funds of the bank.

B. As the cashier had no authority to buy the gold for the bank, or contract for its deposit there, the defendant could not be responsible for it, until with the knowledge and assent of the directors it had been mingled with the defendants' funds.

Atlantic Bank *vs.* Merchants' Bank, 10 Gray, 532.
Skinner *vs.* Merchants' Bank, 4 Allen, 290.

C. And as the cashier had no authority to deal with the gold, either by purchase or receiving it on deposit for Mellen, Ward & Co. to draw upon it, he clearly has not the power to bind the defendant by any declarations concerning the transaction.

D. When Smith made this declaration he was not acting as agent of the defendants.

XVII. If it be said that the certificate of the cashier is *prima facie* evidence that the drawers were depositors, and had funds to meet the checks, it comes to the same thing, in substance and effect, as a power to certify where the drawers were not depositors, or had no credit at the bank. It does indirectly what the latter power would do directly.

A. The relation created by depositing money in a bank is that of debtor and creditor, — the depositor, the creditor; the bank, the debtor. The money deposited becomes the money of the bank. The depositor has for it the promise of the bank to pay him so much money on his orders or checks. The relation is the result, then, of contract. When a cashier or teller pays the check of a depositor having credit at the bank,

he pays as the bank has promised: every dollar that is thus paid out discharges so much of the debt due the depositor from the bank. The cashier is but executing the contract of the bank.

B. When the cashier accepts the draft or check of a non-depositor, a new and different contract is entered into. The bank agrees to advance or loan so much money to the drawer. The bank becomes the creditor, and drawer of the check the debtor. It is not enough to say the two things differ: there is no resemblance between them. The bank may be very willing to have A its creditor, and very unwilling to have him its debtor.

XVIII. The defence might, if necessary, go one step further and say that if there were any evidence tending to show that the directors either expressly or impliedly authorized the cashier to certify these checks, the bank would not be bound. Even the directors are but trustees for the stockholders, and the law will protect their interest and property.

A. If the directors had in terms said to the cashier, "Mellen, Ward & Co. have no account with the bank, they are not depositors, we have none of their funds, but you may at any time certify and guaranty the payment of their checks to the amount of six hundred thousand dollars," defendants submit that upon the authority of the case of Minor *vs.* the Bank of Alexandria, *ubi supra*, and upon the plainest reasons of public policy, this court would hold that the acts were void.

B. The banks are the financial agents of the government, and their officers are public functionaries, to be kept within the strict line of power and duty. They are not to be considered as private corporations, whose principal object is individual trade and individual profit, but as public corporations created for public and national purposes.

Osborn *vs.* Bank of United States, 9 Wheaton, 738.

Such a power delegated to the cashier, or recognized even in the directors, would imperil the whole system.

C. The use or toleration of certified checks is against the policy of the banking act of the United States. Bills are to be issued to the bank not exceeding 90 per cent of the bonds deposited at par value. Stat. of 1864, ch. 106, sect. 21. The greatest care was taken to restrict the circulation and to secure its redemption. Sects. 22, 23, 24, 26, 27,

47, 50. It is familiar history that certified checks have been used chiefly, if not wholly, to eke out the currency; in other words, to defeat the policy of the law.

The doing the very act alleged to have been done by the cashier would, under the act of March 3, 1869, authorize the comptroller of the currency to put the bank in liquidation.

D. A more specific objection to the giving to the cashier the power to accept these drafts, or the exercise of it by the directors themselves, is, that it clearly contravenes the provisions of the 29th section of the banking act. It would create a liability of Mellen, Ward & Co. to the defendant bank exceeding one-tenth part of the capital of the bank; to the extent, indeed, of nearly a third of the capital.

XIX. The second of the grounds on which plaintiffs rest is, a sale of gold certificates and coin to the defendants, through their agent and cashier, Smith. The considerations, as to the power of the cashier to enter into contracts by certifying the checks, already suggested, apply with equal force here.

The cashier had no authority to make the purchase: none under the act of Congress, none under the by-laws, none under any vote of the directors, none under the oral consent of the directors, or any one of them, none under any practice or any one precedent of his own.

A. As to the cashier's power of buying or selling gold, there is no evidence of any usage or practice in other banks, for though Fuller, on a re-examination, puts buying and selling gold among the powers used by cashiers, he says, on the re-cross, that he has no knowledge as to any other cashier buying and selling gold than himself, and that he always acted under the authority of the president, and not on an authority exercised by virtue of his office as cashier. Pp. 42, 43.

B. The only evidence therefore, of usage, custom, course of business, or single cases of buying and selling gold, are those of the plaintiff bank, in which the cashier always acted under the authority of the president. In the only case of dealing in gold by a bank, that between the plaintiffs, Mellen, Ward & Co., it appears that the president was consulted at every step till the transaction took place, out of which this suit has arisen. Pp. 8, 9, 10, 27, 28.

C. Still further, there is no evidence that the defendant bank ever engaged in the business of buying and selling gold, or so held themselves out to the public. Though the statute *permits*, it does not *require* the bank to deal in gold. It is for the directors to decide whether they will enter upon this business or not; without their consent, express or implied, the cashier could not do it.

D. If the cashier had made the most formal purchase of the plantiffs' gold, the defendants could not be holden. If the directors had received the gold coin or certificates, and had not within a reasonable time, or on reasonable request, returned them, the bank might be charged with their value. But the putting them into the hands of Smith (if proved) is nothing; for if Smith had no authority to make the contract for the gold, he certainly was not the defendants' agent to receive the gold.

E. Nor would the delivery to, and receipt of the gold or gold certificates by the defendants' cashier, when absent from the bank, create a deposit for Mellen, Ward & Co., or render the bank liable on any implied assumpsit to the owner. If one delivers money to the cashier of a bank when absent from the bank, to deposit, or to pay a note in the bank, he makes the cashier his agent to deposit or pay; and if the money be lost or stolen before it reaches the bank, the bank is not liable.

Manhattan Co. *vs.* Lydig, 4 Johnson, 377.
Bullard *vs.* Randall, 1 Gray, 605.
Thatcher *vs.* Bank of State of New York, 5 Sandf. 121.

F. This rule, applicable to banks generally, has peculiar force to one organized under the United States Banking Act, which requires that "its usual business shall be transacted at an office or banking-house located in the place specified in its organization certificate."

XX. If the cashier had the power to purchase, the plaintiff had no right to sell.

A. The gold which went out of the Merchants' Bank that day was the gold on which, as security, the Merchants' Bank had advanced to Mellen, Ward & Co. fifteen per cent short of its market value; which they were bound to return to Mellen, Ward & Co., upon payment of the advances, and interest at the rate of six per cent on the money advanced; and which the bank might call for at any day. They had no

right to sell or deliver it to anybody but Mellen, Ward & Co., or their agents or assigns.

B. The transaction between the plaintiff bank and Mellen, Ward & Co. was a loan. Pp. 9, 28, 29, 87, 88.

Personal security was given by memorandum checks for $50,000. But whether this was so or not is not material.

The relation of debtor and creditor was created between the parties, for the plaintiffs had the right to call upon Mellen, Ward & Co. at any time to pay the money.

C. The mingling of the coin or certificates with those of plaintiffs cannot affect the rights of parties.

It is not brought home to Mellen, Ward & Co., or shown to be with their consent. If it were, it would be immaterial, when the property is of this character, having no ear-mark, and when it appears that during the time the party lending was in condition to restore.

Nourse *vs.* Prime, 4 John Char. 190.
Dicken *vs.* Allen, 7 Hill, 497.

D. The amount advanced by the bank was some sixty-two thousand dollars less than the market value of the gold certificates.

The amount advanced is wholly inadequate as a price, and this inadequacy is justly regarded as one of the most important tests. Owners do not sell for consideration so manifestly inadequate.

Russell *vs.* Southard, 12 How. 139, p. 148.

E. Mellen, Ward & Co. had a right to the gold at any time by paying the advance.

F. The bank had the right at any time to demand the payment of the money.

G. Interest was to be paid on the sum advanced at the rate of six per cent.

H. No matter what name the parties give to the transaction, these essential features remain and show conclusively a loan.

XXI. But whether the contract of plaintiffs with Mellen, Ward & Co. was a loan or conditional sale, Mellen, Ward & Co. had a right to receive the gold upon payment of the amount advanced, with interest.

Neither the bank nor Smith had such right.

A. If Smith was not an agent to contract, he was not to receive.

B. At the time of the delivery, Carter and Smith were present. Carter said he had come in for his gold; it was delivered. The delivery in contemplation of law was to Carter, the only person present competent to receive.

C. Whether the manual caption was by Carter or Smith is immaterial.

Frost *vs.* Cloutman *et ux.*, 7 New Hamp. 15.

In this case, the recoverer has been in possession of the demanded premises ever since the recovery. The recoverer and Joseph Frost, to whose use the recovery was had, were both in possession and upon the land immediately upon the recovery. And *Littleton* says, when two be in one house, and the one claimeth by one title and the other by another title, the law shall judge him in possession that hath right to be in possession.

D. The payment, if any was made, was made by Mellen, Ward & Co. The checks were their checks none the less after the certificates than before. If the word "good" can be treated as a guaranty by the bank, Mellen, Ward & Co. were the principals. If the checks, when certified, were acceptances of the bank, yet in contemplation of law they were drafts on and to be paid from their funds in the hands of the bank, charged to the account of Mellen, Ward & Co., and of course their property.

XXII. There are other objections to the validity of the transactions counted upon by the plaintiffs, somewhat more technical in their character, which may be briefly stated: —

A. That the certificates were made by the cashier when absent from the banking-house, and were in violation of the 8th section of the act of Congress requiring its business to be done at its office or banking-house: That none of the presumptions which would attach to payments made or other acts done over the bank's counter, apply to these.

B. That the certified checks are illegal and void, as within the prohibition of the 23d section of the banking act, which forbids any banking association to issue post notes, or any other notes, to circulate as

money than such as are authorized by the act; and that it is sufficient to bring the certified checks within the provision that they are capable of being so used, and that the general purpose for which they had been used was as a substitute for bills.

C. That the written contracts relied upon could not be offered in evidence, because not duly stamped. That if the certificates were valid, and to bind the bank, they engrafted upon the checks new and distinct contracts, to wit, acceptances of bills, and must be stamped as such.

D. That the plaintiff cannot in this suit proceed upon the certified checks as given in payment for the gold, and at the same time charge the defendant upon the contract for the price of the gold, as for goods sold and delivered. If the plaintiffs repudiate the checks, they may fall back upon the contract of sale; but not till then. Under the well settled law of Massachusetts, the checks were payment; and if the bank is not liable, Smith individually, and the drawers still are.

French *vs.* Price, 24 Pick. 13.

XXIII. There being no proof that the bank ever received the gold coin or certificates, no implied assumpsit could arise.

B. R. CURTIS,
C. B. GOODRICH,
B. F. THOMAS.

MERCHANTS' NATIONAL BANK

vs.

STATE NATIONAL BANK.

DECISION OF THE CIRCUIT COURT.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1870.

MERCHANTS' NATIONAL BANK

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DECISION OF THE CIRCUIT COURT.

MONDAY, Nov. 2.

The Court came in at 10 o'clock, and Mr. Justice Clifford delivered the opinion of the Court on the motion for instructions, as follows: —

I am instructed to deliver the opinion of the Court on the motion in the case of the Merchants' National Bank against the State National Bank. The motion reads as follows: —

"And now, after the close of the evidence offered on behalf of the said plaintiff corporation, the said defendant corporation moves the Court here to instruct the jury that the evidence adduced by the said plaintiff corporation is not sufficient in law to warrant the jury to find a verdict in favor of the said plaintiff corporation upon either of the counts in its said declaration contained; and that, as matter of law, the verdict of the jury upon each of the said Courts should be for the defendant corporation."

Repeated decisions of the Supreme Court have established the rule, that the judges of the Circuit Courts cannot direct a peremptory nonsuit, when the plaintiff is present in Court, and claims the right to submit his case to the jury. Such a power, it is held, is not vested in a federal court, sitting for the trial of issues of facts. But the defendant, instead, thereof, when the plaintiff's case is closed, may, if he sees fit, move the Court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and that, as matter of law, their verdict should be for the defendant. Unless such a motion is made by the defendant at the close of the plaintiff's case, the trial must proceed, and the evidence must be submitted to the jury, under the instructions of the Court. When made, the motion is not one addressed to the discretion of the Court, but it presents a question of law, which it is the duty of the Court to decide; and the ruling of the Court, in granting or refusing the motion, is as

much the subject of exceptions by the party aggrieved as any other ruling of the Court in the course of the trial. In considering the motion, the Court proceeds upon the ground that all the facts stated by the plaintiff's witnesses are true; and the rule is, that the motion should be denied unless the Court is of the opinion, in view of the whole of the plaintiff's evidence, oral and written, and of every inference the law allows to be drawn from it, that the plaintiff has not made out a case which would warrant the jury to find a verdict in his favor. Evidently, the plaintiff's case, when viewed in that light, presents a question of law for the Court; and it is well settled, by the highest authority, that it is the duty of the Court to give the instruction, whenever it appears that the evidence is not legally sufficient to serve as the foundation of a verdict for the plaintiff. *Schuchardt* vs. *Allen*, 1 Wall., 370; *Parks* vs. *Ross*, 11 How. 362; *Bliven et al.* vs. *N. E. Screw Co.*, 23 How. 433.

Guided by these views, the Court has come to the conclusion that the prayer for instruction presented by the defendants must be granted.

Considering that the case is one which will probably be removed into the Supreme Court for review, the Court does not deem it necessary or expedient to enter into any extended discussion of the several questions involved in the motion. Briefly expressed, the grounds of the decision of the Court may be stated in the following propositions, in which both judges concur:—

That the act of Congress of the 3d of June, 1864, entitled "An Act to provide a national currency," etc., conferred no authority upon the cashier of the defendant bank to certify as good the several checks described in the first eight counts of the declaration. 13 Stat. at Large, 99, Secs. 8 and 23.

That the power to certify the checks of third persons, in behalf of the corporation, is not inherent in the office of a cashier of a national bank, nor is the exercise of such a power within the scope of his usual and ordinary duties. *U. S. vs. the City Bank of Columbus*, 21 How. 356; *Miner et al.* vs. *Mechanics' Bank of Alexandria*, 1 Pet. 71; *Bank of U. S.* vs. *Dunn*, 6 Pet. 51; *Fleckner* vs. *U. S. Bank*, 8 Whea. 360; *Osborn* vs. *Bank of U. S.*, 9 Whea. 738; *Mussey* vs. *The Eagle Bank*, 9 Met. 306; *Kirk* vs. *Bell*, 162 B. 290; same case, 12 Eng. L. & Eq., 389; *Hoyt* vs. *Thompson*, 1 Selden, 320; *Bank Commissioners* vs. *Bank of Buffalo*, 6 Paige, 497; 1 Am. Leading Cases, 460–472.

Recent cases decided in the courts of New York, referred to by the plaintiffs, do not affect the question, as they were founded either upon an admission in the pleadings or an agreed statement of facts, admitting that the usage was that cashiers might certify checks, or upon proof that such had been the practice of the defendant bank. Whether the teller had authority from the bank to certify checks was not a question in the case of *Willets* vs. *the Phœnix Bank*, 2 Duer, 129, because the opinion of the Court shows that the complainant averred, and the answer admitted, that the certifying of the checks was the act of the defendant bank.

Slight examination, also, of the case of *The Farmers' and Mechanics' Bank of Kent Co.* v. *the Butchers' and Drovers' Bank*, 4 Duer, 219, will show that it contains nothing to support the theory that the cashier of the defendant bank had authority to certify as good the checks in question in this case. The statement of the Court in that case, was that the teller "had general authority to certify checks," but the exception to his acts was, that his general authority in that behalf was qualified by directions not to give such certificates unless the customer had funds. Contrary to those instructions, the charge of the defendant bank was, that he colluded with a customer, and certified his checks when the customer had no funds on deposit.. The decision of the Court was, that the bank was liable for the amount of the check, as it appeared beyond controversy that the plaintiff was a *bona fide* holder of the checks, without notice. *Same* vs. *same*, 14 N. Y. 623; *same* vs. *same*, 16 N. Y. 125.

Support to the theory of the plaintiffs cannot be drawn from the case of *Claflin* vs. *The Farmers' and Citizens' Bank*, 25 N. Y. 293, as it was admitted in that case that the president, who certified the check, had a general authority to that effect, but the checks as certified were held to be void, even in the hands of a *bona fide* holder, because they were checks drawn by himself.

"Checks on a bank marked 'good,'" say the Court, in the case of *Girard Bank* vs. *The Bank of Penn. township*, 39 Penn. State, 99, "are to be regarded as evidence of deposit to the credit of the holder," but the authority of the president, cashier, or any other officer of the bank

to make such a certificate was not made a question in the case, and was not decided by the Court.

3. By the true construction of the 17th Article of the By-Laws, it confers no such power upon the cashier of the bank, and there is no evidence in the case that the directors or the corporation ever authorized the acts of the cashier in making the certificates upon the checks under consideration.

4. Proof of any such usage on the part of the defendant bank, or of any such antecedent practice by their cashier, is entirely wanting; and the evidence as to the usage of other banks fails altogether to show that the cashiers of the other banks in this city, or any one of them, are authorized to certify checks as good, either with or without funds in the bank. Twenty-two of the cashiers of the national banks, located and doing business in this city, were examined by the plaintiffs, and not one of them testified that he ever, as cashier of a bank organized under the Act of Congress, certified a check of a third person as good. None testified affirmatively in that respect; but one, if no more, testified that he never had given such a certificate. They all concur that, as cashiers, they borrow money for their respective banks, whenever the bank is in want of money, and give the check of the bank for the amount, and sign as cashier. Their testimony also is, that they buy and sell New York funds as the agents of their respective banks. Those selling, give a draft on New York, signing it as cashier; and those buying, give checks or pay for the same in legal tender notes or other national currency, or other current funds. The plaintiffs also proved, that the cashier of the defendant bank, prior to the 23d of February, 1867, borrowed large sums of money of the Second National Bank in this city on checks signed by him as cashier; and the cashier of the latter bank testified that he knew no one in the several transactions but the cashier who gave the checks.

Giving full effect to the testimony as to usage, it only proves that there is a usage among the banks in this city that the cashiers of the banks may borrow money of the other banks in the settlement of balances through the clearing-house, and may sign the checks given for the same, in behalf of their respective banks; and that they may also buy and sell New York funds in the manner before explained. But the opinion of

the Court is, that the evidence introduced to prove usage has no tendency to show that there is any usage among the banks in this city that the cashier of a national bank may certify checks as in this case. The better opinion is, that a power evidenced by usage must be considered as defined and limited by the usage. Strong doubts are entertained by the Court, even if it were proved that such a usage prevailed among the other banks in the city, whether it could be regarded as evidence that the cashier of the defendant bank had any such authority, unless it appeared that the defendant bank had in some way, directly or indirectly, adopted or sanctioned the usage. But it is not necessary to decide that question at the present time. Be that as it may, it is nevertheless clear that usage cannot make a contract, or vary or enlarge one, as made by the parties. Evidence of usage is admissible to explain what is doubtful, but it is not admissible to contradict what is plain. *Insurance Companies* vs. *Wright*, 1 Wall, 470; *Bliven et al.* vs. *N. E. Screw Co.* 23 How, 431; *Schooner Reside*, 2 Sum. 567; *Dickinson* vs. *Gay*, 7 Allen, 37; *Dodd et al.* vs. *Farrow et al.*, 11 Allen, 428.

Viewed in any light, the Court is of the opinion that there is no evidence of usage in this case which would warrant the jury in finding that the cashier of the defendant bank had any authority whatever to bind the bank by his certificates that the checks were good.

The argument of the plaintiffs also is, that the certificates of the cashier import on their face that he was authorized to exercise that power in behalf of the bank. Stated in other words, the proposition is, that the certificate affords a *prima facie* presumption of authority in the officer to make the certificate; but the Court is of a different opinion, as that proposition, if adopted, would enable the cashier to exercise all the powers vested in the directors by the act of Congress to which reference has been made. Payments made, or money received over the counter of the bank by the cashier, are doubtless within that rule, and so, perhaps, are any other acts of the cashier within the scope of his usual and ordinary duties. But the doctrine cannot be applied to the acts of the cashier outside of his usual and ordinary duties, without establishing a rule which will enable every cashier at will to absorb all the powers of the directors, and to render null the most important features of the 8th section of the act of Congress, providing for a national currency.

Doubtless the decision of the Court in the case of *The Bank of Vergennes* vs. *Warren*, 7 Hill, 91, was in fact founded on that distinction; but if it was the intention of the Court to give it a wider application, it is clear that it is contrary to the decisions of the Supreme Court of the United States, and cannot be followed by this Court.

II. The ninth count of the declaration is for goods sold and delivered by the plaintiff bank to the defendant bank; but the Court decides that there is no evidence in the case which would warrant the jury in finding that the plaintiff bank ever sold the gold certificates and the coin, or either of the same, to the defendant bank, or to the cashier thereof in their behalf, as alleged in that count.

III. Assuming that the propositions stated are correct, then it necessarily follows that the plaintiffs have no cause of action under the tenth and eleventh counts of the declaration. They have not introduced any evidence in the case which would warrant the jury in finding a verdict in their favor under those counts. Motion granted.